Judicial Council Task Force on Jury Instructions
Appointed by the Honorable Chief Justice Ronald M. George

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CRIMINAL JURY INSTRUCTIONS
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TASK FORCE ON JURY INSTRUCTIONS
CRIMINAL SUBCOMMITTEE

Preface

Introduction

The California Judicial Council Task Force on Jury Instructions has been charged by Chief Justice Ronald George with writing "jury instructions that both accurately state the law and are more easily understandable to jurors."[i] The draft instructions that follow are only a section of the much larger set of instructions that the Task Force Subcommittee on Criminal Instructions has drafted. The Subcommittee hopes that release of this group of instructions now will stimulate public critique and enable the drafters to refine both the particular instructions and the more global choices about format and approach as the drafting effort continues.

The Task Force has based the instructions on a de novo review of relevant decisional precedent and statutory materials because a license to use the copyrighted CALJIC materials was not available. These materials are circulated under the Copyright of the California Judicial Council. They have not yet been officially approved for use.

Background: Creation of the Task Force

In December of 1995, the Judicial Council established a Blue Ribbon Commission on Jury System Improvement. The Commission's mission was to "conduct a comprehensive evaluation of the jury system and [make] timely recommendations for improvement."[ii] After extensive study, the commission made a number of recommendations to the Chief Justice and the Judicial Council, one of which was that the Council create a Task Force on Jury Instructions to draft more understandable instructions. The recommendation stemmed from the Commission's conclusion that "jury instructions as presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror."[iii]

In light of the Commission's view that jurors could be accurately instructed on the law in language more easily absorbed and understood, the Judicial Council acted on the recommendation, creating the current Task Force. The Chief Justice noted the two principal goals underlying the creation of more intelligible instructions are "(1) making juror's experiences more meaningful and rewarding and (2) providing clear instructions that will improve the quality of justice by insuring that jurors understand and apply the law correctly in their deliberations."[iv]

Purpose of this Release for Comment

The Chief Justice encouraged the Task Force to solicit broad input from those representing a wide rage of views and experience. In response, the drafters seek public commentary at this intermediate point in the process. Commentary at this stage can inform both revisions of existing drafts and choices for the remaining instructions. We have a released a small but representative sample rather than a much larger number of completed drafts to facilitate input on an expedited basis. The Task Force is interested in reactions to style, format, legal accuracy, clarity, and usefulness of accompanying bench notes and commentary. The Task Force is not a law revision commission. Our goal is to produce instructions that accurately explain the existing law in a manner the average juror can readily understand and that the trial bench and bar will find helpful. We appreciate your willingness to assist in this effort.

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[i] *Videotape*, Address of Chief Justice Ronald George to Task Force on Jury Instructions (Judicial Council of California, Administrative Office of the Courts 2/18/97).
[ii] Final Report of the Blue Ribbon Commission on Jury System Improvement (Judicial Council of California, Administrative Office of the Courts 5/6/1996) p.1.
[iii] *Id.* at p. 93
[iv] See, *supra*, note 1.

Drafting Policies

The members of the task force carefully considered, and sometimes extensively debated, many issues concerning how the instructions should be drafted. The decisions of the task force on the most significant of those issues are discussed and explained below.

Drafting Guidelines

The task force reviewed the literature addressing jury instructions and considered the recommendations for improving instructional clarity and comprehensibility. (See, e.g., Lind and Partridge, *Suggestions for Improving Juror Understanding of Instructions*; *Pattern Jury Instructions Suggested by the Federal Judicial Center* (1987); Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal.L.Rev. 731 (1981); Charrow and Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Columbia L.Rev. 1306 (1979); and Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L.Rev. 37 (1993).) When drafting the instructions, we applied many of the specific techniques suggested by the literature, including the following:

- Avoid using nominalizations.
- Use "modal" verbs (must, should, may) to clarify the jury's task.
- Avoid redundancy or unnecessary words.
- Use the active voice.
- Use short sentences.
- Keep the subject close to the verb; move dependent phrases to the beginning or end of the sentence.
- Avoid omitting relative pronouns and auxiliary verbs.
- Avoid double negatives.
- Be concrete rather than abstract.
- Avoid instructing the jurors about things they do not need to know.
- Adopt a structure that is logical and easy to follow.

In addition to these general principles, the task force adopted the following specific guidelines.

References to the parties

The task force chose to refer to the lawyer for the People as "the prosecutor." Although some members thought the word prosecutor may have a negative connotation compared to "district attorney," most felt that it was a neutral word and that jurors were likely to understand it. "District attorney," although neutral

and understandable, would not always be accurate, because a different agency (such as the office of the Attorney General) might prosecute the case, and we did not want the judge to have to modify each instruction in such an instance. After much consideration, we chose to use "the defendant" to refer to the party being prosecuted. Most members felt that this term did not have a negative connotation, and that it was commonly used in the courtroom.

Statutory and caselaw formulations

The task force felt strongly that it was not our role to suggest changes in the law or to resolve conflicts in the case law interpreting statutes. Rather, our mandate was to restate the existing law in understandable terms. We closely followed formulations of the law contained in statutes and cases, substituting a more understandable word if an accurate synonym for the legal language could be found, and defining terms when necessary.

For example, where proof by a "preponderance of the evidence" was required, we substituted the equivalent language "more likely than not." Conversely, in the "reasonable doubt" instruction, we considered adopting the formulation used in the federal courts. The federal instruction did not include the concept that the jury must have an *abiding* conviction, which is part of the standard set out in Penal Code section 1096. We chose to use the language contained in the California statute, and clarified it by reordering and substituting simpler terms where appropriate, without omitting any of the concepts contained in the statute.

In a few instances where a clear conflict existed in the case law, we drafted alternative formulations to allow the trial judge to decide which was appropriate. If the statutory language was ambiguous, but had been clarified by case law, we used the approved and more comprehensible language.

Tailoring the instruction to the case

We recognized that sometimes it would be helpful for the jurors to have instructions tailored to the specific case. For example, in some jurisdictions the name of the defendant and the name of the victim are inserted into the instruction. Competing with the benefit of this approach is the potential burden imposed on trial judges and their staffs who must prepare the instructions. At some point in the future, the instructions will undoubtedly be available in an electronic format and the substitution of names or other specific words within the instructions will be possible with a simple keystroke. Because many judges currently rely on instructions printed on paper, however, we did not want to make the use of these instructions unnecessarily complicated or increase the risk of error and therefore did not rely on a 'fill-in-the-blank' approach.

Generally, we did not require that the instructions be tailored to the facts of the case, except (1) if the instruction would otherwise be confusing (for example, if the instruction on the defendant's statements were given in a multi-defendant case), or (2) if the instruction would be given only on request, so that the attorney requesting it would have the opportunity to tailor it to the facts (for example, see instruction 408, Exercise of Privilege by Witness.).

Elements of the Crimes

The task force gave a good deal of thought to defining the elements of crimes. The major issue was whether to present definitions in the abstract ("a theft is committed when a person takes property . . .") or to present them as applied to the case ("the defendant is guilty of robbery if he took property . . .") The task force decided to define the crimes concretely with reference to the defendant and in the past tense. This approach is endorsed by the literature on juror comprehension and gives the jury clearer direction in making its decision.

Structure

We attempted to organize instructional issues and concepts logically. Related concepts and fragments integrated into a single instruction rather than presented as discreet, unrelated pieces of information.

Tone

The task force's mandate is to produce instructions that are accurate and comprehensible to jurors. In setting a tone, the task force attempted to balance the need for clarity of language and 'plain English' choices with the formality necessary given the importance of the instructions.

Bench Notes

The bench notes are organized into categories. Following each instruction is a statement indicating whether the judge has a duty to give the instruction, either sua sponte or on request. A section for related instructions follows and lists other associated and commonly given instructions.

The next section describes the authority relied on for the instructional language and other definitions. We have also included a "Commentary" section where specific drafting choices are explained, or other issues are addressed by the task force. Finally, a list of approved lesser-included offenses is provided for the instructions on elements of crimes and a section on related issues is included for

all instructions. The latter section is intended to address finer points of law and factually specific issues relating to the instructions.

Key to Using Instructions

The instructions are written in bold face type. Material that is bracketed is optional and should be given under the facts of the case. Material that is in parentheses must be given but a choice must be made.

For example, in the arson instruction a definition of structure has been provided. (See instruction 1050, Arson, for full text.)

> **[A structure is any (building/bridge/tunnel/power plant/commercial or public tent).]**

The brackets around the material mean that the definition is given only if a structure has allegedly been burned. If this definition is given, the type of structure would be selected from the alternatives enclosed in parenthesis depending upon the facts of the case.

Series 10 – Pre-trial Instructions

10. Trial Process
20. Cautionary Admonitions: Jury Conduct
30. Notetaking
40. Reasonable Doubt
50. Evidence
60. Witnesses

Task Force Comments on this Series

The task force decided that the optimal way to organize the many pre-trial instructions required or recommended to be given was in the form of a comprehensive script. This material is organized in the categories listed above and contains instructions that must be given sua sponte in every case in addition to generally applicable instructions that are recommended in every case.

A similar "posttrial" script has been included to be delivered at the close of evidence. Although there is some overlap in the instructional issues in each script, the task force believed it valuable to provide judges with tailored instructions, which did not require modification, for each stage of the trial.

10. Trial Process (Before or During Voir Dire)

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1. **Jury service is very important and I would like to welcome you and thank you for your service. Before we begin, I am going to describe for you how the trial will be conducted, and explain what you and the lawyers and I will be doing. At the end of the trial, I will give you more detailed guidance on how you are to go about reaching your decision.**

2. **The first step in the trial is the prosecutor's opening statement. The defense may also choose to give an opening statement. An opening statement is not evidence. Its only purpose is to give you an overview of what the attorneys expect the evidence will show.**

3. **Next, the prosecution will offer its evidence. Evidence usually includes witness testimony and exhibits. After the prosecution presents its evidence, the defense may also present evidence but is not required to do so. Because (he/she) is presumed innocent, the defendant does not have to prove that (he/she) is not guilty.**

4. **After you have heard all the evidence and the attorneys give their final arguments, I will instruct you on the law that applies to the case. You must follow all of my instructions, even if you disagree with them.**

5. **After you have heard the arguments and instructions, you will go to the jury room to deliberate and reach a decision.**

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give an instruction outlining how the trial will proceed. This instruction has been provided for the convenience of the trial judge who may wish to explain the trial process to jurors.

20. Cautionary Admonitions: Jury Conduct (After Jury is Selected)

1. **I will now explain some basic rules of law and procedure. These rules ensure that both sides receive a fair trial.**

2. **During the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends. You must not talk about these things with the other jurors either, until the time comes for you to begin your deliberations.**

3. **As jurors, you may discuss the case together only after all of the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you must discuss the case only in the jury room, and only when all jurors are present.**

4. **You must not listen to anyone who tries to talk to you about the case or about any of the people or subjects involved in it. If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation and immediately report the incident to the bailiff. If anyone tries to influence you or any other member of the jury, you must promptly report that to the bailiff.**

5. **When the trial has ended and you have been released as jurors, you may discuss the case with anyone. But under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.**

6. **You must not allow anything that happens outside of the courtroom to affect your decision. During the trial, do not read, listen to, or watch any news reports about the case.**

7. **Do not do any research on your own or as a group. Do not use a dictionary or other reference materials, investigate the facts or law, conduct any experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.**

8. **Keep an open mind throughout the trial. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations. Do not take anything I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.**

9. **Do not let bias, sympathy, prejudice, or public opinion influence your decision.**

10. **If a juror violates one of these directions, please notify the bailiff promptly.**

[11. **If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through the bailiff. I will discuss the question with the attorneys and decide whether it may be asked.**]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct the jurors on how they must conduct themselves during trial. (Pen. Code, § 1122.)

The instruction in paragraph 11 may be given at the court's discretion.

AUTHORITY

Statutory Admonitions ▸ Pen. Code, § 1122.
Avoid Discussing the Case ▸ *People v. Pierce* (1979) 24 Cal.3d 199; *In re Hitchings* (1993) 6 Cal.4th 97; *In re Carpenter* (1995) 9 Cal.4th 634, 646–58.
Avoid News Reports ▸ *People v. Holloway* (1990) 50 Cal.3d 1098, 1108–11.
No Independent Research ▸ *People v. Karis* (1988) 46 Cal.3d 612, 642; *People v. Castro* (1986) 184 Cal.App.3d 849, 853; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820.
No Bias, Sympathy, or Prejudice ▸ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73.
Judge's Conduct as Indication of Verdict ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517.

30. Note-Taking

You have been given notebooks and may take notes during the trial. Please leave your notebooks on your chair at the end of each court session. You may take your notes into the jury room during deliberations. Here are some points to consider if you take notes:

1. **Your notes may be inaccurate or incomplete.**

2. **The court reporter is making a record of everything said during the trial. During your deliberations, you may ask that the court reporter's notes of particular testimony be read to you.**

3. **Note-taking may tend to distract you. It may affect your ability to listen carefully to all the testimony and to watch the witnesses as they testify.**

4. **You should use your notes only to remind yourself of what happened during the trial. If you cannot agree about what the testimony was on an important point, you may ask that the court reporter's record be read to you. You must accept the court reporter's record as accurate.**

I do not mean to discourage you from taking notes. I believe you may find it helpful. However, if you decide to take notes, please bear in mind the points that I have made.

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on note-taking; however, instruction on this topic has been recommended by the Supreme Court. (*People v. Morris* (1991) 53 Cal.3d 152, 214.)

AUTHORITY

Jurors' Use of Notes ▸ *People v. Whitt* (1984) 36 Cal.3d 724, 746.

40. Reasonable Doubt

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1. **I will now explain the presumption of innocence, the prosecutor's burden of proof, and the charges against the defendant. The defendant in this case is charged with _____** *[insert charge[s]]* **and has pleaded not guilty. The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because (he/she) has been arrested and charged with a crime.**

2. **A defendant in a criminal case is presumed to be innocent. This presumption requires that the prosecutor prove each element of the crime[s] [and special allegation[s]] beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.**

3. **In deciding whether the prosecution has proven its case beyond a reasonable doubt, you must impartially compare and consider all the evidence. Unless the evidence proves the defendant guilty beyond a reasonable doubt, (he/she) is entitled to an acquittal and you must find (him/her) not guilty.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the presumption of innocence and the state's burden of proof before deliberations. (*People v. Vann* (1974) 12 Cal.3d 220, 225–27; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463; *People v. Phillips* (1997) 59 Cal.App.4th 952, 956–58.) This instruction is included in this section for the convenience of judges who wish to instruct on this point during voir dire or before testimony begins.

AUTHORITY

Instructional Requirements ▸ Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–04; *Sandoval v. California* (1994) 511 U.S. 1, 16–17; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997.

COMMENTARY

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Sandoval v. California* (1994) 511 U.S. 1, 16–17.) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–04; *People v. Garcia* (1975) 54 Cal.App.3d 61.) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language.

50. Evidence

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1. **It is your duty to determine what the facts are in this case. You must use only the evidence that is presented in the courtroom to help you make this determination. "Evidence" is the testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence.**

2. **Nothing that the attorneys say is evidence. In their opening statements and final arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are also not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they help you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question that suggests it is.**

3. **During the trial, the attorneys may object to questions asked of a witness. If an objection is proper, I will sustain it, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did. Attorneys may also move to strike testimony from the record. If I grant the motion and strike the testimony, you must ignore it.**

4. **You must disregard anything you see or hear when the court is not in session, even if it is done or said by a party or witness.**

[If it appears that circumstantial evidence will be substantially relied on in the case, the trial court may wish to instruct on its definition here; See instruction 300, Circumstantial Evidence.]

BENCH NOTES

Instructional Duty
There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these principles has been approved. (See *People v. Barajas* (1983) 145 Cal.App.3d 804, 809; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–44; *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

AUTHORITY

Evidence Defined ▸ Evid. Code, § 140.
Arguments Not Evidence ▸ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809.

Questions Not Evidence ▸ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–44.
Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121.

60. Witnesses

1. **You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's race, sex, religion, [or] national origin, [or _____]** *[insert any other potential impermissible bias as appropriate]***. You may believe all, none, or part of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.**

2. **In evaluating a witness's testimony, consider the following questions**:

   a. **How well could the witness see or hear [or otherwise sense] the things about which the witness testified?**

   b. **How well was the witness able to remember and describe what happened?**

   c. **What was the witness's behavior while testifying?**

   d. **Did the witness understand the questions and answer them directly?**

   e. **Did the witness have a reason to lie, such as a bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?**

   f. **What was the witness's attitude about the case or about testifying?**

   g. **Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?**

   h. **How reasonable is the testimony when you consider all the other evidence in the case?**

   [i. **Did other evidence prove or disprove any fact about which the witness testified?**]

   [j. **Did the witness admit to being untruthful?**]

   [k. **What is the witness's character for truthfulness?**]

   [l. **Has the witness been convicted of a felony?**]

[m. **Has the witness engaged in [other] conduct that reflects on his or her believability?**]

3. **Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.**

4. **If you decide that a witness deliberately lied, consider the importance of the lie. You may choose not to believe anything that witness says. However, if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–84.) Although there is no sua sponte duty to instruct on inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107.)

Bracketed Factors

There is a split of authority on whether question "l" relating to a witness's prior conviction for a felony, should be given sua sponte. (Compare *People v. Mayfield* (1972) 23 Cal.App.3d 236, 245 [sua sponte duty] with *People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [no sua sponte duty].) This point should not be included when a prior felony conviction is an element of the charged crime. (*People v. Dewberry* (1959) 51 Cal.2d 548, 554.)

Questions "i," "j," and "k" have been approved as appropriate factors to be considered by the jury in evaluating the credibility of witnesses. (Evid. Code, § 780(e), (i), and (k).) Because they are fact specific they should only be given if supported by the evidence.

Question "m" refers to evidence of other misconduct introduced to impeach a witness. (*People v. Wheeler* (1992) 4 Cal.4th 284.)

AUTHORITY

Factors ▸ Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–84.
Inconsistencies ▸ *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426.
Witness Who Lies ▸ *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107.

Series 100 – Post-trial Instructions

100. Duties of Judge and Jury
110. Reasonable Doubt
120. Evidence
130. Witnesses
190. Pre-Deliberation Instructions

Task Force Comments on this Series

Like the pretrial script, the posttrial script is designed as a comprehensive way to instruct on general points required to be given at the close of evidence. This material is organized in the categories listed above and contains instructions that must be given **sua sponte** in every case, in addition to generally applicable instructions that are recommended in every case.

To facilitate an orderly presentation of ideas, the post trial script was organized so that other case-specific instructions could be inserted and given in a logical sequence.

100. Duties of Judge and Jury

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1. **Members of the jury, I will now instruct you on the law that applies to this case. [I will give you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions so that you can follow along as I read them to you.]**

2. **You must decide what the facts are. It is up to you, and only you, to decide what happened, based only on the evidence that you have seen and heard in this trial.**

3. **Do not let bias, sympathy, prejudice, or public opinion influence your decision.**

4. **You must reach your verdict without any consideration of punishment.**

5. **You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments conflict with my instructions, you must still follow my instructions.**

6. **Pay careful attention to all the instructions that I give you, because they state the law that applies to this case. Consider all the instructions together. If I repeat any instruction, this does not necessarily mean that it is more important than any others.**

7. **After you have decided what the facts are, you may find that some instructions do not apply. You must then follow the instructions that do apply to the facts, in order to reach your verdict.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jurors are the exclusive judges of the facts and that they are entitled to a copy of the written instructions when they deliberate. (Pen. Code, §§ 1093(f), 1137.) The court should select the appropriate bracketed alternative discussing written instructions. Although there is no sua sponte duty to instruct on the other topics described in this instruction, there is authority approving instruction on these topics.

AUTHORITY

Copies of Instructions ▸ Pen. Code, §§ 1093(f), 1137.
Jury to Decide the Facts ▸ Pen. Code, § 1127.
Judge Determines Law ▸ Pen. Code, §§ 1124, 1126.
No Bias, Sympathy, or Prejudice ▸ *People v. Hawthorne* (1992) 4 Cal.4th 43, 73.
Do Not Consider Punishment ▸ *People v. Nichols* (1997) 54 Cal.App.4th 21, 24.
Attorney's Comments Are Not Evidence ▸ *People v. Stuart* (1959) 168 Cal.App.2d 57, 60–61.
Consider All Instructions Together ▸ *People v. Osband* (1996) 13 Cal.4th 622, 679; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046; *People v. Shaw* (1965) 237 Cal.App.2d 606, 623.
Follow Applicable Instructions ▸ *People v. Palmer* (1946) 76 Cal.App.2d 679, 688.

110. Reasonable Doubt

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1. **The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because (he/she) has been arrested and charged with a crime.**

2. **A defendant in a criminal case is presumed to be innocent. This presumption requires that the prosecutor prove each element of the crime[s] [and special allegation[s]] beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.**

3. In deciding whether the prosecution has proven its case beyond a reasonable doubt, you must impartially compare and consider all the evidence. Unless the evidence proves the defendant guilty beyond a reasonable doubt, (he/she) is entitled to an acquittal and you must find (him/her) not guilty.

[The court may give instructions on elements of the crime here.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the presumption of innocence and the state's burden of proof. (*People v. Vann* (1974) 12 Cal.3d 220, 225–27; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463; *People v. Phillips* (1997) 59 Cal.App.4th 952, 956–58.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–04; *Sandoval v. California* (1994) 511 U.S. 1, 16–1; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997.

COMMENTARY

This instruction is based directly on Penal Code section 1096. The primary changes are a reordering of concepts and a definition of reasonable doubt stated in the affirmative rather than in the negative. The instruction also refers to the jury's duty to impartially compare and consider all the evidence. (See *Sandoval v. California* (1994) 511 U.S. 1,

16–17.) The appellate courts have urged the trial courts to exercise caution in modifying the language of section 1096 to avoid error in defining reasonable doubt. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503–04; *People v. Garcia* (1975) 54 Cal.App.3d 61.) The instruction includes all the concepts contained in section 1096 and substantially tracks the statutory language.

RELATED ISSUES

Reasonable Doubt Raised by Defense

A defendant is entitled, on request, to a nonargumentative instruction that directs attention to the defense's theory of the case and relates it to the state's burden of proof (*People v. Sears* (1970) 2 Cal.3d 180, 190 [error to deny requested instruction relating defense evidence to the element of premeditation and deliberation].) Such an instruction is sometimes called a pinpoint instruction. "What is pinpointed is not specific evidence as such, but the theory of the defendant's case. It is the specific evidence on which the theory of the defense 'focuses' which is related to reasonable doubt." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338 [court erred in refusing to give requested instruction relating self-defense to burden of proof]; see also *People v. Granados* (1957) 49 Cal.2d 490 [error to refuse instruction relating reasonable doubt to commission of felony in felony-murder case]; *People v. Brown* (1984) 152 Cal.App.3d 674, 677–78 [error to refuse instruction relating reasonable doubt to identification].) (See instruction 415, Eyewitness Identification for an example of a pinpoint instruction that relates reasonable doubt to the defense theory of the case.)

120. Evidence

1. **It is your duty to determine what the facts are in this case. You must use only the evidence that was presented in this courtroom. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.**

2. **Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorney's questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was.**

3. **During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. Attorneys may have moved to strike testimony. If I granted the motion and struck the testimony, you must ignore it.**

4. **You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.**

[5. **While we were hearing evidence, you were told that the prosecutor and the defense agreed, or stipulated, to certain facts. This means simply that they both accept those facts as true. Therefore, there is no need for evidence on those points, and you must accept those facts as true.**]

[If circumstantial evidence has been substantially relied on in the case, the trial court can instruct on its definition here; See instruction 300, Circumstantial Evidence.]

[6. **As you know, more than one defendant is on trial here. I am going to remind you now which individuals are charged with which crimes.**

_____has been charged with _____.
_____has been charged with _____.

You must decide the guilt or innocence of each defendant separately. This means that you must separately consider the evidence as it applies to each defendant.

You must also give separate consideration to each crime charged against each defendant.
If you cannot reach a verdict on (all/both) of the defendants, or on all of the charges against any one defendant, you must give your verdict on any defendant or charge upon which you have unanimously agreed.]

[7. As you know, the defendant has been charged with more than one crime. You must decide defendant's guilt or innocent of each crime separately. This means that you must separately consider the evidence as it applies to each crime.

BENCH NOTES

Instructional Duty
There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these topics has been approved. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–44; *People v. Horton* (1995) 11 Cal.4th 1068, 1121.) If stipulations were given, give the bracketed instruction in paragraph 5. If more than one defendant is on trial, give the bracketed instruction in paragraph 6. If defendant has been charged with more than one crime, give the bracketed instruction in paragraph 7.

AUTHORITY

Evidence Defined ▸ Evid. Code, § 140.
Stipulations ▸ *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–42.
Arguments Not Evidence ▸ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809.
Questions Not Evidence ▸ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–44.
Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121.

RELATED ISSUES

Non-Testifying Courtroom Conduct
There is authority for an instruction informing the jury to disregard defendant's in-court, but non-testifying behavior. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 90 [defendant was disruptive in court; court instructed jurors they should not consider this behavior in deciding guilt or innocence].) If the defendant has put his or her character in issue or another basis for relevance exists, however, this instruction should not be given. (*People v. Garcia, supra,* at p. 91, fn. 7; *People v. Foster* (1988) 201 Cal.App.3d 20, 25.)

130. Witnesses

1. **You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's race, sex, religion, or national origin, [or _____]** *[insert any other impermissible bias as appropriate]***. You may believe all, none, or part of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.**

2. **In evaluating a witness's testimony, consider the following questions**:

   a. **How well could the witness see or hear [or otherwise sense] the things about which the witness testified?**

   b. **How well was the witness able to remember and describe what happened?**

   c. **What was the witness's behavior while testifying?**

   d. **Did the witness understand the questions and answer them directly?**

   e. **Did the witness have a reason to lie, such as a bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?**

   f. **What was the witness's attitude about the case or about testifying?**

   g. **Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?**

   h. **How reasonable is the testimony when you consider all the other evidence in the case?**

   [i. **Did other evidence prove or disprove any fact about which the witness testified?**]

   [j. **Did the witness admit to being untruthful?**]

   [k. **What is the witness's character for truthfulness?**]

   [l. **Has the witness been convicted of a felony?**]

[m. **Has the witness engaged in [other] conduct that reflects on his or her believability?**]

3. **Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.**

4. **If you decide that a witness deliberately lied, consider the importance of the lie. You may choose not to believe anything that witness says. Or if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest.**

[Instructions on the evaluation of certain types of witnesses and evidence should be given here. The relevant instructions should be selected from Series 300 and Series 400.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on factors relevant to a witness's credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–84.) Although there is no sua sponte duty to instruct on inconsistencies in testimony or a witness who lies, there is authority approving instruction on both topics. (*Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107.)

Bracketed Factors

There is a split of authority on whether question "l," relating to a witness's prior conviction for a felony, should be given sua sponte. (Compare *People v. Mayfield* (1972) 23 Cal.App.3d 236, 245 [sua sponte duty] with *People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [no sua sponte duty].) This point should not be included when a prior felony conviction is an element of the charged crime. (*People v. Dewberry* (1959) 51 Cal.2d 548, 554.)

Questions "i," "j," and "k" have been approved as appropriate factors to be considered by the jury in evaluating the credibility of witnesses. (Evid. Code, § 780(e), (i), and (k).) Because they are fact specific they should only be given if supported by the evidence.

Question "m" refers to evidence of other misconduct introduced to impeach a witness. (*People v. Wheeler* (1992) 4 Cal.4th 284.)

AUTHORITY

Factors ▸ Evid. Code, § 780; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–84.
Inconsistencies ▸ *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426.
Witness Who Lies ▸ *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107.

190. Pre-Deliberation Instructions

1. **When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.**

2. **It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not give up your honest beliefs just because other jurors disagree with you.**

3. **Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote. Try to keep an open mind so that you and your fellow jurors can openly exchange your ideas about this case. Deliberations will be easier if you treat your fellow jurors courteously.**

4. **During the trial, several items were received into evidence as exhibits. [These exhibits will be sent into the jury room with you when you begin to deliberate.] [You may examine whatever exhibits you think will help you in your deliberations. If you wish to see any exhibits, please request them in writing.]**

5. **If you need to communicate with me while you are deliberating, you may send a note through the bailiff, signed by the presiding juror or by one or more members of the jury. No member of the jury should try to communicate with me except by a written note. I will consult with the attorneys before I answer your questions, so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions either in writing or orally here in open court. Do not tell me or anyone else how the jurors stand on the question of guilt, unless I ask you to do so.**

6. **Your verdict [on each count and any special finding(s)] must be unanimous. This means that, to return a verdict, all twelve of you must agree to it.**

7. **It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]**

8. **You will be given verdict forms. As soon as all twelve jurors have agreed upon a verdict, the presiding juror must date and sign the appropriate verdict form(s) and**

notify the bailiff. [If you are able to reach a unanimous decision on only one or only some of the (charges/or/defendants), fill in those verdict forms only, and notify the bailiff.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856; *People v. Selby* (1926) 198 Cal. 426, 439; *People v. Hunt* (1915) 26 Cal.App. 514, 517.)

If the court automatically sends exhibits into the jury room, the court should so instruct using the first bracketed sentence in paragraph 4. If not, the court should alert the jury that they may request the exhibits in writing and instruct using the second bracketed sentence in paragraph 4.

If the court chooses to comment on the evidence, then the instruction found in the last sentence of paragraph 7 should not be given. (See Pen. Code, §§ 1127, 1093(f).)

AUTHORITY

Duty to Deliberate ▸ *People v. Gainer* (1977) 19 Cal.3d 835, 856.
Keep an Open Mind ▸ *People v. Selby* (1926) 198 Cal. 426, 439.
Exhibits ▸ Pen. Code, § 1137.
Questions ▸ Pen. Code, § 1138.
Unanimous Verdict ▸ Cal. Const., art. I, § 16; *People v. Howard* (1930) 211 Cal. 322, 325; *People v. Kelso* (1945) 25 Cal.2d 848, 853–54; *People v. Collins* (1976) 17 Cal.3d 687, 692.
Judge's Conduct as Indication of Verdict ▸ *People v. Hunt* (1915) 26 Cal.App. 514, 517.
Verdict Forms ▸ Pen. Code, § 1140.

Series 300 – Evidence

300. Circumstantial Evidence
306. All Available Evidence
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340. *Miranda*-Defective Statements
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300. Circumstantial Evidence

Facts may be proven in two ways: directly or indirectly by circumstantial evidence. Direct evidence proves a fact by itself. If, for example, witnesses see something, then come to court and testify, their testimony is direct evidence of what they saw. Circumstantial evidence, on the other hand, proves a fact based on a logical conclusion. Here is an example of how circumstantial evidence works: a party proves Fact A, then argues that because Fact A is true, logically you should conclude that Fact B is also true. Both direct and circumstantial evidence are acceptable. Neither is necessarily more or less reliable than the other.

You cannot convict (a/the) defendant based on circumstantial evidence unless you examine all reasonable conclusions that can be drawn from that evidence. If there is only one reasonable conclusion, you must accept it. On the other hand, if two or more reasonable conclusions can be drawn and one points to innocence, you must accept the one that points to innocence. In other words, you may not decide that the defendant is guilty based on circumstantial evidence unless (his/her) guilt is the only reasonable conclusion that can be drawn from the circumstantial evidence.

Any fact that is a link in a chain of circumstantial evidence essential to the prosecutor's case must be proved beyond a reasonable doubt. If any such fact has not been proved beyond a reasonable doubt, you must not find the defendant guilty of the crime based on that circumstantial evidence [or find true a special allegation based on that circumstantial evidence].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [duty exists where circumstantial evidence relied on to prove any element, including intent]; see *People v. Boyd* (1987) 43 Cal.3d 333, 351–52; *People v. Heishman* (1988) 45 Cal.3d 147, 167; *CJER Mandatory Criminal Jury Instructions Handbook* (1998) §§ 2.4, 2.90, pp. 16, 75; see also *People v. Butler* (1980) 104 Cal.App.3d 868, 876–78 [discussing whether circumstantial evidence was substantially relied on or merely corroborative and finding it only corroborative].)

Related Instructions
If intent is the only element proved by circumstantial evidence, then give instruction 301, Circumstantial Evidence: Intent. (*People v. Marshall* (1996) 13 Cal.4th 799, 849.)

AUTHORITY

Direct Evidence, Defined ‣ Evid. Code, § 410.
Inference, Defined ‣ Evid. Code, § 600(b).
Instructional Requirements:

- Difference Between Direct and Circumstantial Evidence ‣ *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [no sua sponte duty to instruct, but court approves definition].
- Between Two Reasonable Interpretations of Circumstantial Evidence, Accept the One That Points to Innocence ‣ *People v. Merkouris* (1956) 46 Cal.2d 540, 560–62 [error to refuse requested instruction on this point]; *People v. Johnson* (1958) 163 Cal.App.2d 58, 62 [sua sponte duty to instruct].
- Circumstantial Evidence Must Be Entirely Consistent With a Theory of Guilt and Inconsistent With Any Other Rational Conclusion ‣ *People v. Bender* (1945) 27 Cal.2d 164, 175 [sua sponte duty to instruct]; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [same].
- Each Fact in a Chain of Circumstantial Evidence Must Be Proved ‣ *People v. Watson* (1956) 46 Cal.2d 818, 831 [error to refuse requested instruction on this point].

See generally *People v. Boyd* (1987) 43 Cal.3d 333, 351–52 [sua sponte duty to instruct on above principles when prosecutor's case rests substantially on circumstantial evidence].

RELATED ISSUES

Extrajudicial Admissions
Extrajudicial admissions, although hearsay, are not the type of indirect evidence requiring instruction on circumstantial evidence. (*People v. Wiley* (1976) 18 Cal.3d 162, 174–75.)

Corroborating Evidence
An instruction on evaluating circumstantial evidence is not required when the evidence is only incidental to and corroborative of direct evidence. (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1270–71; *People v. Jerman* (1946) 29 Cal.2d 189, 197; see also *People v. Wright* (1990) 52 Cal.3d 367, 406 [no instruction required where circumstantial evidence only corroborates direct evidence]; *People v. Williams* (1984) 162 Cal.App.3d 869, 874–76 [no duty to instruct when circumstantial evidence used to corroborate accomplice's testimony; although corroborating evidence needed to substantiate direct

evidence given by accomplice, it was not type of evidence requiring circumstantial evidence instruction].)

306. All Available Evidence

Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant.

BENCH NOTES

Instructional Duty
No authority imposes a duty to give an instruction on all available evidence sua sponte; however, it should be given on request. (See generally Pen. Code, §§ 1093(f), 1127; *People v. Pitts* (1990) 223 Cal.App.3d 606, 880, 881.)

AUTHORITY

Instructional Requirements ▸ *People v. Simms* (1970) 10 Cal.App.3d 299, 313.

RELATED ISSUES

Willful Suppression of or Failure to Obtain Evidence
Willful suppression of evidence by the government constitutes a denial of a fair trial and of due process. (*People v. Noisey* (1968) 265 Cal.App.2d 543, 549–50.) Likewise, willful failure by investigating officers to obtain evidence that would clear a defendant would amount to a denial of due process of law. (*Ibid.*) However, failure to look for evidence is quite different from suppressing known evidence and "the mere fact that investigating officers did not pursue every possible means of investigation of crime does not, standing alone, constitute denial of due process or suppression of evidence." (*Ibid.*; see also *People v. Tuthill* (1947) 31 Cal.2d 92, 97–98 ["[t]here is no compulsion on the prosecution to call any particular witness or to make any particular tests so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial."].)

307. Proof Need Not Show Actual Date

The (information/indictment) in this case states that the crime occurred on [or about] _____ *[insert alleged date]*. The prosecutor is not required to prove that the crime took place exactly on that day but only that it happened on or reasonably close to that day.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction that the prosecutor does not have to prove the exact time and day the crime was committed. This instruction should not be given (1) when the evidence demonstrates that the offense was committed at a specific time and place and the defendant has presented a defense of alibi or lack of opportunity and (2) when two similar offenses are charged in separate counts. (*People v. Jennings* (1991) 53 Cal.3d 334, 358–59; *People v. Jones* (1973) 9 Cal.3d 546, 557, overruled on different grounds by *Hernandez v. Superior Court* (1989) 49 Cal.3d 713; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–98; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–16; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–75.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 955; *People v. Jennings* (1991) 53 Cal.3d 334, 358–59; *People v. Jones* (1973) 9 Cal.3d 546, 557; *People v. Barney* (1983) 143 Cal.App.3d 490, 497–98; *People v. Gavin* (1971) 21 Cal.App.3d 408, 415–16; *People v. Deletto* (1983) 147 Cal.App.3d 458, 474–75.

315. Consciousness of Guilt: False Statements

If [the] defendant [_____ *[insert name of defendant]*] made a false or misleading statement relating to the charged crime, knowing it was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of that crime. If you conclude that [the] defendant [_____ *[insert name of defendant]*] made such a statement knowing it was false or intending to mislead, you may consider it [only] in determining (his/her) guilt. [You may not consider it in deciding any other defendant's guilt.]

Evidence that the defendant made such a statement cannot prove guilt by itself. If you conclude the defendant made the statement, it is up to you to decide its meaning and importance.

BENCH NOTES

Instructional Duty

People v. Atwood (1963) 223 Cal.App.2d 316, 333–34 held that the court had a **sua sponte** duty, under the circumstances of that case, to instruct on consciousness of guilt when there was evidence that the defendant intentionally made a false statement from which such an inference could be drawn. (See also *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103–04 [approving instruction on this point]; *1998 CJER Mandatory Criminal Jury Instructions Handbook,* § 2.92, p. 76.)

This instruction should not be given unless it can be inferred that the defendant made the false statement for self-protection rather than to protect someone else. (*People v. Rankin* (1992) 9 Cal.App.4th 430, [error to instruct on false statements and consciousness of guilt where defendant lied to protect an accomplice]; see also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839.)

AUTHORITY

Instructional Requirements ▸ *People v. Atwood* (1963) 223 Cal.App.2d 316, 333.

COMMENTARY

The word "willfully" was not included in the description of the making of the false statement. Although one court suggested that the jury be explicitly instructed that the defendant must "willfully" make the false statement (*People v. Louis* (1984) 159 Cal.App.3d 156, 161–62), the California Supreme Court subsequently held that such language is not required. (*People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9.)

RELATED ISSUES

Evidence

The false nature of the defendant's statement may be shown by inconsistencies in the defendant's own testimony, his or her pretrial statements, or by any other prosecution evidence. (*People v. Kimble* (1988) 44 Cal.3d 480, 498 [overruling line of cases that required falsity to be demonstrated only by defendant's own testimony or statements]; accord *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103; *People v. Williams* (1995) 33 Cal.App.4th 467, 478–79.)

316. Consciousness of Guilt: Fabrication and Suppression of Evidence

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Alternative A - suppression
If the defendant tried to hide evidence or discourage someone from testifying against (him/her), that conduct may show that (he/she) was aware of (his/her) guilt. Evidence of such an attempt cannot prove guilt by itself. If you conclude the defendant made such an attempt, it is up to you to decide its meaning and importance.

Alternative B - fabrication
If the defendant tried to create false evidence or obtain false testimony, that conduct may show that (he/she) was aware of (his/her) guilt. Evidence of such an attempt cannot prove guilt by itself. If you conclude the defendant made such an attempt, it is up to you to decide its meaning and importance.

Alternative C - fabrication or suppression by a third party
If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of (his/her) guilt, but only if the defendant was present and knew about or authorized the other person's actions. Evidence of such conduct cannot prove guilt by itself. If you conclude such an attempt was made, it is up to you to decide the meaning and importance of this evidence.

BENCH NOTES

Instructional Duty
No authority imposes a duty to give this instruction sua sponte. However, *People v. Atwood* (1963) 223 Cal.App.2d 316, held that the court had a **sua sponte** duty, under the circumstances of that case, to instruct on consciousness of guilt based on defendant's false statements because they pertained to the vital question of whether defendant admitted his guilt. (*Id.* at pp. 333-34.)

AUTHORITY

Instructional Requirements ▸ *People v. Atwood (1963) 223 Cal.App.2d 316*
Suppression of Evidence ▸ Evid. Code, § 413.
Fabrication of Evidence ▸ *People v. Jackson* (1996) 13 Cal.4th 1164, 1222; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1138.

Fabrication or Suppression of Evidence by Third Party ▸ Evid. Code, § 413; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1138.

318. Defendant's Flight

If defendant fled [or tried to flee] (immediately after the crime was committed/after (he/she) was accused of committing the crime) that conduct may show that (he/she) was aware of (his/her) guilt. Evidence that the defendant fled [or tried to flee] cannot prove guilt by itself. If you conclude that the defendant fled [or tried to flee], it is up to you to decide the meaning and importance of that conduct.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on flight whenever the prosecution relies on evidence of flight. (*People v. Williams* (1960) 179 Cal.App.2d 487, 491.)
There is, however, no reciprocal duty to instruct on the significance of the absence of flight, even on request. (*People v. Williams* (1997) 55 Cal.App.4th 648, 651.)

If the defendant's flight did not occur immediately after the crime was committed, the trial court should give the second option in the paranthetical. (*People v. Carrera* (1989) 49 Cal.3d 291, 313 [flight from county jail]; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1712 [where flight was from custody, the instructional language "immediately after the commission of a crime" was irrelevant but harmless].)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 1127c; *People v. Williams* (1960) 179 Cal.App.2d 487, 491; *People v. Bradford* (1997) 14 Cal.4th 1005, 1054–55.

RELATED ISSUES

Flight, Meaning
Flight does not require a person to physically run from the scene or make an escape. What is required is acting with the purpose of avoiding observation or arrest. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055 [defendant fled when he left victim's apartment after killing her, told the assistant manager, "I really got to get the hell out of here," returned to his apartment, packed his belongings, asked a former girlfriend who lived out of the area if he could stay with her, and repeatedly pleaded with his roommate to drive him out of town].)

330. Limited Purpose Evidence in General

During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other.

BENCH NOTES

Instructional Duty
The court has no sua sponte duty to give an admonition limiting consideration of evidence; however, it must be given on request. (Evid. Code, § 355; *People v. Simms* (1970) 10 Cal.App.3d 299, 311.)

AUTHORITY

Instructional Requirements ▸ Evid. Code, § 355; *People v. Simms* (1970) 10 Cal.App.3d 299, 311.

RELATED ISSUES

Timing of Instruction
The court has discretion to give limiting instructions at the time the evidence is admitted or at the close of evidence. (*People v. Dennis* (1998) 17 Cal.4th 468, 533–34 [giving limiting instruction regarding use of defendant's statements to psychiatrist at close of all evidence did not result in error].)

332. Multiple Defendants: Limited Admissibility of Evidence

I instructed you during the trial that certain evidence was admissible only against [a] certain defendant[s]. You must not consider that evidence against (any/the) other defendant[s].

BENCH NOTES

Instructional Duty
The court has no sua sponte duty to give an instruction limiting evidence to one defendant; however, it must be given on request. (Evid. Code, § 355; *People v. Miranda* (1987) 44 Cal.3d 57, 83 disapproved of on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907.)

AUTHORITY

Instructional Requirements ▸ Evid. Code, § 355.

RELATED ISSUES

See generally, the related issues section under instruction 330, Limited Purpose Evidence in General.

333. Multiple Defendants: Limited Admissibility of Defendant's Statement

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You heard evidence that defendant _____ *[insert defendant's name]* **made a statement (out of court/before trial). You may consider that evidence only against (him/her), not against (any/the) other defendant[s].**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on defendant's statements; however, it must be given on request. (Evid. Code, § 355; *People v. Simms* (1970) 10 Cal.App.3d 299, 311.)

In most cases, the defendant will make the statement out of court, and the court should therefore instruct using that language. If the statement was made in a previous proceeding, the court should instruct that it was made "before trial." (See *People v. Perry* (1972) 7 Cal.3d 756, 787–88.)

If the statement was made in the course of a conspiracy, it may be admissible against all conspirators to prove the conspiracy. (See 1 Witkin, Cal. Evidence (3d ed. 1986) Statement Made During Conspiracy, § 680, p. 664.)

AUTHORITY

Instructional Requirements ▸ Evid. Code, § 355.

RELATED ISSUES

See generally, the related issues section under instruction 330, Limited Purpose Evidence in General.

338. Other Perpetrator

The evidence shows that (another person/other persons) may have been involved in the commission of the crime[s] charged against the defendant. Your sole duty is to decide if the defendant on trial here committed the crime[s] charged. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether (that other person has/those other persons have) been or will be prosecuted.

[This instruction does not apply to the testimony of _____ *[insert names of testifying coparticipants]***.]**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on co-participants; however, it must be given on request. (See *People v. Sanders* (1990) 221 Cal.App.3d 350, 359.)

If other alleged participants in the crime are testifying, this instruction should not be given or the bracketed portion should be given exempting the testimony of those witnesses. (*People v. Carrera* (1989) 49 Cal.3d 291, 312; *People v. Sully* (1991) 53 Cal.3d 1195, 1218; *People v. Williams* (1997) 16 Cal.4th 153, 226–27.)

AUTHORITY

Instructional Requirements ▸ *People v. Farmer* (1989) 47 Cal.3d 888, 918–19; *People v. Sanders* (1990) 221 Cal.App.3d 350, 359.

RELATED ISSUES

Jury Can Still Consider Evidence That Someone Else Was the Perpetrator

"The instruction does not tell the jury it cannot consider evidence that someone else was the perpetrator. It merely says the jury is not to speculate on whether someone else might or might not be prosecuted." (*People v. Farmer* (1989) 47 Cal.3d 888, 918–19.)

339. Consent: Prior Sexual Intercourse

You have heard evidence that the alleged victim had consensual sexual intercourse with the defendant before the act that is charged in this case. You may consider this evidence only to help you decide (whether the alleged victim consented to the charged act[s]/[and] whether the defendant reasonably and in good faith believed that the alleged victim consented to the charged act(s)). You may not consider this evidence for any other purpose.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this limiting admonition if the defendant is charged with rape or unlawful sexual intercourse or an attempt or assault with intent to commit either crime and evidence of prior sexual intercourse with the alleged victim has been admitted. (Pen. Code, § 1127d.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 1127d.

RELATED ISSUES

Admissibility of Sexual Conduct of Complaining Witness
Evidence Code section 782 sets out the procedure for admitting evidence of the sexual conduct of the complaining witness.

340. *Miranda*-Defective Statements

You have heard evidence that the defendant made a statement to a police officer before trial. [I am now referring to the statement allegedly given to _____ *[insert name of officer or indicate time, place, or other information to identify the statement]***.]**

If you conclude that the defendant made this statement, you may consider it only to help you decide whether to believe the defendant's trial testimony. You may not consider the statement for any other purpose.

[You should view an unrecorded oral statement cautiously.]

BENCH NOTES

Instructional Duty

There is a split of authority over whether the court has a sua sponte duty to give an instruction on *Miranda*-defective statements. (Compare *People v. Duncan* (1988) 204 Cal.App.3d 613, 619 with *People v. Wyatt* (1989) 215 Cal.App.3d 255, 258; *People v. Baker* (1990) 220 Cal.App.3d 574, cert. den. 498 U.S. 497.) The Center for Judicial Education and Research (CJER) notes the split and includes a cautionary instruction on this principle among those instructions to be given sua sponte**.** (*1998 CJER Mandatory Criminal Jury Instructions Handbook*, § 2.216 at p. 96.) Those cases that do not impose a sua sponte duty recognize a duty to instruct on request. (*People v. Wyatt, supra*; *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1090.) The committee suggests that the better practice is for the court to instruct **sua sponte** unless the defendant objects.

If the defendant made more than one statement, but not all of the statements are subject to the limiting admonition, specify the relevant statement or statements using the bracketed text in the first paragraph.

AUTHORITY

Instructional Requirements ▸ *People v. May* (1988) 44 Cal.3d 309; *Harris v. New York* (1971) 401 U.S. 222.

341. Adoptive Admissions

If you conclude that someone made a statement outside of court that (accused the defendant of the crime [or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true:

1. The statement was directed to the defendant or made in (his/her) presence.

2. The defendant heard and understood the statement.

3. The defendant would, under all the circumstances, naturally have denied the statement if (he/she) thought it was not true.

AND

4. The defendant could have denied it but did not.

If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

[You must not consider this evidence in determining the guilt of (the/any) other defendant[s].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the foundational requirements for adoptive admissions if such evidence is admitted. (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 381, citing *People v. Atwood* (1963) 223 Cal.App.2d 316, 332–34; see also *People v. Humphries* (1986) 185 Cal.App.3d 1315, 1336.)

If the court instructs on adoptive admissions, the court also has a **sua sponte** duty to instruct on corpus delicti. (See instruction __, Corpus Delicti; see also *People v. Jennings* (1991) 53 Cal.3d 334, 364 [discussing corpus delicti rule in the case of an affirmative admission; by analogy the rule also should apply to adoptive admissions].)

The limiting admonition in the last sentence of the instruction must be given on request when other co-defendants are on trial. (*People v. Richards* (1976) 17 Cal.3d 614, 618–19; see generally Evid. Code, § 355.)

Do not give this instruction if the defendant's failure to reply was based on his or her invocation of the right to remain silent. (*Griffin v. California* (1965) 380 U.S. 609; *People v. Cockrell* (1965) 63 Cal.2d 659.)

AUTHORITY

Instructional Requirements ▸ *People v. Atwood* (1963) 223 Cal.App.2d 316, 332–33; *People v. Vindiola* (1979) 96 Cal.App.3d 370; *People v. Humphries* (1986) 185 Cal.App.3d 1315, 1336.

RELATED ISSUES

Defendant Intoxicated When Admission Made
"Declarations of a prisoner under the influence of intoxicants are not rendered inadmissible by reason of his drunkenness. That condition would go only to the weight of the evidence." (*People v. MacCagnan* (1954) 129 Cal.App.2d 100, 112 [instruction on adoptive admission proper despite defendant's intoxication when questioned concerning ownership of narcotic; jury may consider evasiveness of the answer since declarations under influence of intoxicants are not rendered inadmissible by reason of drunkenness].)

348. Failure to Explain or Deny Adverse Testimony

If the defendant failed in (his/her) testimony to explain or deny evidence against (him/her), and if (he/she) could reasonably be expected to have done so based on what (he/she) knew, you may consider (his/her) failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to establish an inference of guilt. The prosecutor must still prove each element of the case beyond a reasonable doubt.

If you conclude the defendant did fail to explain or deny, it is up to you to decide the meaning and importance of that failure.

BENCH NOTES

Instructional Duty

No authority imposes a duty to give this instruction sua sponte. This instruction should only be given when the defendant testifies and the privilege against self-incrimination has not been successfully invoked. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455; *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1118.) Before an instruction on this principle may be given, the trial court must ascertain (1) if a question was asked that called for an explanation or denial of incriminating evidence, (2) if the defendant knew the facts necessary to answer the question, or if some circumstance precluded the defendant from knowing such facts, and (3) if the defendant failed to deny or explain the incriminating evidence when answering the question. (*People v. Saddler* (1979) 24 Cal.3d 671, 682–83 [instruction erroneously given because there was no evidence that defendant failed to deny or explain incriminating evidence]; *People v. Marsh* (1985) 175 Cal.App.3d 987, 994 [same]; *People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [same]; see also *People v. Marks* (1988) 45 Cal.3d 1335, 1346.) Contradiction of the state's evidence is not by itself a failure to deny or explain. (*People v. Marks, supra,* 45 Cal.3d at p. 1346; *People v. Peters* (1982) 128 Cal.App.3d 75, 86.) Failure to recall is not an appropriate basis for this instruction. (*People v. De Larco, supra,* 142 Cal.App.3d at p. 309.)

One court has cautioned against giving this instruction unless both parties agree and there is a significant omission on the part of the defendant to explain or deny adverse evidence. (*People v. Haynes, supra,* 148 Cal.App.3d at pp. 1117-18.)

AUTHORITY

Instructional Requirements ▸ Evid. Code, § 413.

Cautionary Language ‣ *People v. Saddler* (1979) 24 Cal.3d 671, 683.

RELATED ISSUES

Bizarre or Implausible Answers
If the defendant's denial or explanation is bizarre or implausible, several courts have held that the question whether his or her claim of ignorance is reasonable should be given to the jury with an instruction regarding adverse inferences. (*People v. Mask* (1986) 188 Cal.App.3d 450, 455; *People v. Roehler* (1985) 167 Cal.App.3d 353, 392–93.) But see *People v. Kondor*: "[T]he test for giving the instruction [on failure to deny or explain] is not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear." (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.)

Facts Beyond the Scope of Examination
If the defendant has limited his or her testimony to a specific factual issue, it is error for the prosecutor to comment, or the trial court to instruct, on his or her failure to explain or deny other evidence against him or her that is beyond the scope of this testimony. (*People v. Tealer* (1975) 48 Cal.App.3d 598, 604–07.)

Series 400 – Witnesses

400. Single Witness' Testimony
405. Character of Defendant
406. Cross Examination of Character Witness
408. Exercise of Privilege by Witness
415. Eyewitness Identification
420. Testimony of Child 10 Years or Younger

400. Single Witness's Testimony

[Except for the testimony of _____ *[insert witness's name],* **which requires corroborating evidence or extra proof,] (the/The) testimony of a single witness can prove any fact in the case. Before relying on the testimony of a single witness to prove a fact, you should carefully review any other evidence on that point.**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction on a single witness's testimony in every case where corroboration is not required. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–85.) Insert the bracketed language if the testimony of an accomplice or other witness requires corroboration. (*People v. Chavez* (1985) 39 Cal.3d 823, 831–32.)

The following constitutional provisions and statutes require evidence that corroborates a witness's testimony: Cal. Const., art. I, § 20 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 653f [solicitation of a felony]; 118 [perjury]; 1108 [abortion and seduction of a minor]; 1110 [obtaining property by false pretenses].

AUTHORITY

Instructional Requirements ▸ Evid. Code, § 411; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.
Corroboration Required ▸ *People v. Chavez* (1985) 39 Cal.3d 823, 831–32.

RELATED ISSUES

Uncorroborated Testimony of Defendant
The cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant. (*People v. Turner* (1990) 50 Cal.3d 668, 696, fn. 14.)

Uncorroborated Testimony in Sex Offense Cases
In a prosecution for forcible rape, an instruction that the testimony of a single witness is sufficient may be given in conjunction with an instruction that there is no legal corroboration requirement in a sex offense case. Both instructions correctly state the law and because each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage*

(1992) 2 Cal.4th 693, 701–02 [resolving split of authority on whether the two instructions can be given together].)

405. Character of Defendant

You have heard character testimony that the defendant (is a _____ *[insert character trait]* person/or/has a good reputation for _____ *[insert character trait]* in the community where (he/she) lives or works).

You may take that testimony into consideration along with all the other evidence in deciding whether the prosecutor has proven the case beyond a reasonable doubt.

Evidence of the defendant's character for_____ *[insert character trait]* alone may create a reasonable doubt. If you decide such character evidence is true, it is up to you to determine its meaning and importance.

[If the defendant's character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good.]

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on defendant's character; however, it must be given on request. (*People v. Bell* (1875) 49 Cal. 485, 489–90 [jury should be instructed that evidence of good reputation should be weighed as any other fact established and may be sufficient to create reasonable doubt of guilt]; *People v. Jones* (1954) 42 Cal.2d 219, 222 [character evidence may be sufficient to create reasonable doubt of guilt]; *People v. Wilson* (1913) 23 Cal.App. 513, 523–24 [court erred in failing to give requested instruction or any instruction on character evidence].)

AUTHORITY

Instructional Requirements ▸ *People v. Bell* (1875) 49 Cal. 485, 489–90; *People v. Wilson* (1913) 23 Cal.App. 513, 523–24; *People v. Jones* (1954) 42 Cal.2d 219, 222.
Admissibility ▸ Evid. Code, §§ 1100–1102.

RELATED ISSUES

No Discussion of Character Is Evidence of Good Character

The fact that the defendant's character or reputation has not been discussed or questioned among those who know him or her is evidence of the defendant's good character and

reputation. (*People v. Castillo* (1935) 5 Cal.App.2d 194, 198.) However, the defendant must have resided in the community for a sufficient period of time and become acquainted with the community in order for his or her character to have become known and for some sort of reputation to have been established. (See Evid. Code, § 1324 [reputation may be shown in the community where defendant resides and in a group with which he or she habitually associates]; see also *People v. Pauli* (1922) 58 Cal.App. 594, 596 [witness's testimony about defendant's good reputation in community was inappropriate where defendant was a stranger in the community, working for a single employer for a few months, going about little, and forming no associations].)

Business Community

The community for purposes of reputation evidence may also be the defendant's business community and associates. (*People v. Cobb* (1955) 45 Cal.2d 158, 163.)

406. Cross-Examination of Character Witness

The prosecutor was allowed to ask defendant's character witness(es) if (he/she/they) had heard that the defendant had engaged in certain conduct. These "have you heard" questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider these questions and answers only to evaluate a character witness's testimony.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on cross examination of character witnesses, however it must be given on request. (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 954 [when cross-examination of character witness is permitted, a limiting admonition should be given] Evid. Code, § 355.)

AUTHORITY

Instructional Requirements ▸ *People v. Hempstead* (1983) 148 Cal.App.3d 949, 954; *People v. Eli* (1967) 66 Cal.2d 63, 79.

408. Exercise of Privilege by Witness

A witness may refuse to answer questions that call for privileged information. Under the law, _____ [*insert name of witness*] **was justified in refusing to answer certain questions. You must not consider in any way (his/her) refusal[s] to answer, and you must not guess what (his/her) answer[s] would have been.**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on the exercise of privilege by witnesses; however, it must be given on request. (Evid. Code, § 913 subd. (b); see also *People v. Mincey* (1992) 2 Cal.4th 408, 440—441.)

Related Instructions

Defendant Has No Obligation to Testify, __.

AUTHORITY

Instructional Requirements ▸ Evid. Code, § 913(b); *People v. Mincey* (1992) 2 Cal.4th 408, 440-41.

415. Eyewitness Identification

You have heard eyewitness identification testimony. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.

In evaluating identification testimony, consider the following questions:

a. **Did the witness know the defendant before the event?**

b. **How well could the witness see the perpetrator?**

c. **What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation[, and _____** *[insert any other relevant circumstances]***]?**

d. **How closely was the witness paying attention?**

e. **Was the witness under stress when he or she made the observation?**

f. **Did the witness give a description and how does that description compare to the defendant?**

g. **How much time passed between the event and the time[s] when the witness identified the defendant?**

h. **Was the witness asked to pick the perpetrator out of a group?**

i. **Did the witness ever fail to identify the defendant?**

j. **Did the witness ever change his or her mind about the identification?**

k. **How certain was the witness when he or she made an identification?**

l. **Are the witness and the defendant of different races?**

m. **Were there any other circumstances affecting the witness's ability to make an accurate identification?**

[n. **Was the witness able to identify other participants in the crime?]**

[o. **Was the witness able to identify the defendant in a photographic or physical lineup?]**

[p. _____ *[insert other relevant factors raised by the evidence]***]**

If you are not convinced beyond a reasonable doubt, based on all the evidence, that it was the defendant who committed the crime, you must find (him/her) not guilty.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on eye-witness testimony. An instruction relating eyewitness identification to reasonable doubt, including any relevant "pinpoint" factors, must be given by the trial court on request "[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability." (*People v. Wright* (1988) 45 Cal.3d 1126, 1143–44; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Palmer* (1984) 154 Cal.App.3d 79, 89 [error to refuse defendant's requested instruction on eyewitness testimony].)

AUTHORITY

Factors ▸ *People v. Wright* (1988) 45 Cal.3d 1126, 1139, fn. 9, 1141; *People v. West* (1983) 139 Cal.App.3d 606, 609.

COMMENTARY

The court should give the unbracketed factors, if requested, in every case in which identity is disputed. The bracketed factors n, o, and p should be given if requested and factually appropriate. Factor p has been provided to include any factual circumstances relevant to eyewitness identification that have not been addressed in the preceding list of factors.

Factor h addresses the situation where the identification is made by a "single person show-up." Compare to factor o, which specifically addresses photographic or physical lineups.

In *People v. Wright* (1988) 45 Cal.3d 1126, 1139, the court suggested that the trial court should select factors from an approved list of eyewitness identification factors and then give counsel the opportunity to supplement with any additional relevant factors. (*Id.* at pp. 1126, 1143.) Additional "pinpoint" factors should be neutrally written, brief, and nonargumentative. (*Ibid.*; see also *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302–03, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.)

RELATED ISSUES

Unreliability of Eyewitness Identification

An instruction to view eyewitness testimony with caution and that "mistaken identification is not uncommon" should not be given because it improperly singles out this testimony as suspect. (*People v. Wright* (1988) 45 Cal.3d 1126, 1153 [special cautionary instruction unnecessary as duplicative of required eyewitness "factors" instruction]; see also *People v. Benson* (1990) 52 Cal.3d 754, 805, fn. 12.) If a defendant wants to present information on the unreliability of eyewitness identifications under a particular set of circumstances, he or she must use means other than a jury instruction,such as expert testimony. (*People v. Wright, supra,* 45 Cal.3d at pp. 1126, 1153–54.)

420. Testimony of Child 10 Years of Age or Younger

You have heard testimony from a child under the age of 10. As with any other witness, you must decide whether the child gave truthful and accurate testimony.

In evaluating the child's testimony, you should consider all of the factors surrounding that testimony, including the following:

1. **How old is the child?**
2. **What is the level of the child's mental development?**
3. **Did the child understand the seriousness of giving testimony under oath?**
4. **Did the child understand the questions?**
5. **Does the child have a good memory?**
6. **[**_____ *[insert other relevant factors raised by the evidence]***.]**

Although a child witness may behave differently than an adult, that does not necessarily mean that a child is any more or less believable. You should not discount or distrust the testimony of a child just because of his or her age.

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to give an instruction on child witnesses; however, it must be given on request. (Pen. Code, § 1127f.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 1127f.

RELATED ISSUES

Due Process/Equal Protection Challenges

"The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom 'traditional assumptions' may previously have biased the fact-finding process." (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392–94 [instructing jury to make credibility determinations based on child's age, level of cognitive development, and other factors surrounding child's testimony does not inflate testimony of child witness and thereby lessen prosecutor's burden of proof and deny defendant due process and equal protection].)

Series 500 – Aiding & Abetting, Inchoate And Accessorial Crimes

Theories of Culpability

500. Aiding and Abetting: General Principles
501. Aiding and Abetting: Intended Crimes
501. Aiding and Abetting: Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)
502. Aiding and Abetting: Natural and Probable Consequences Doctrine (Only Non-Target Offense Charged)

Accessorial Crimes

520. Accessories
530. Solicitation
531. Solicitation of a Minor

Task Force Comments on this Series

The task force recognizes that theories of culpability and inchoate crimes present particularly challenging issues for the layperson because they are theoretically complex and difficult to apply factually. The same challenges exist in drafting clear, useful instructions.

With respect to the aiding and abetting instructions, the committee adopted three techniques to address this complexity. First, an introductory instruction, called "General Principles," has been provided which briefly explains liability under aiding and abetting and the natural and probable consequences doctrine. Second, the instructions themselves lead the jury step by step through the requirements for each doctrine. Third, the instructions provide spaces where the specific crimes alleged under each theory are to be inserted. By identifying the specific crimes at each point, the prosecution's theory of guilt is directly connected to the charged offense.

500. Aiding and Abetting: General Principles

The prosecution is alleging that the defendant may be guilty based on a theory of aiding and abetting. Before I continue, I want to explain some general principles about aiding and abetting and theories of guilt in criminal law.

A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. Two, he or she may have aided and abetted another person, who committed the crime. Although the prosecutor must prove different requirements for these theories, a person is equally guilty of the crime whether he or she committed it personally or aided and abetted someone else who committed it.

[Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecutor relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561.)

When the prosecution is relying on aiding and abetting, give this instruction before other instructions on aiding and abetting to introduce this theory of culpability to the jury. If the prosecution is also relying on the natural and probable consequences doctrine, the court should also instruct with the last bracketed paragraph. Depending on which theories are relied on by the prosecution, the court should then instruct as follows.

Intended Crimes (Target Crimes)
If the prosecution's theory is that the defendant intended to aid and abet the crime or crimes charged (target crimes), give instruction 501, Aiding & Abetting: Intended Crimes.

Natural & Probable Consequences Doctrine (Non-Target Crimes)
If the prosecution's theory is that any of the crimes charged were committed as a natural and probable consequence of the target crime, instruction 502 or 503 should be given. If both the target and non-target crimes are charged, give instruction 502, Natural & Probable Consequences (Target and Non-Target Offenses.) In some cases, the prosecution may not charge the target crime but only the non-target crime. In that case,

give instruction 503, Natural & Probable Consequences (Only Non-Target Offense Charged.)

501. Aiding and Abetting: Intended Crimes

The defendant is charged [in Count _____] with _____ *[insert charged offense[s]]***.**

[If the prosecution's theory is that the defendant may also have been a direct perpetrator, insert the elements of the crimes here.]

You may [also] find the defendant guilty of _____ *[insert offense]* **if (he/she) aided and abetted another person who committed that crime. I will call that other person the "perpetrator." You may find the defendant guilty under a theory of aiding and abetting only if the prosecutor has proven:**

1. The perpetrator committed _____ *[insert offense]***.**

2. The defendant knew that the perpetrator intended to commit _____ *[insert offense]***.**

3. Before or during the crime, the defendant aided and abetted the perpetrator in committing _____ *[insert offense]***.**

AND

4. When the defendant acted, (he/she) intended to aid and abet the perpetrator's commission of the crime.

[The perpetrator committed _____ *[insert offense]* **if: _____** *[insert elements of offense substituting "perpetrator" for "defendant"]***.]**

The defendant aided and abetted the perpetrator if he or she did or said something that aided, facilitated, promoted, encouraged or instigated the commission of the crime.

[The fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.]

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime you may consider that fact in determining whether the defendant was an aider and abettor. However, the mere presence at the scene of the crime or failure to prevent the crime does not by itself constitute aiding and abetting.]

[Even a person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things. First, early enough to prevent the commission of the crime, he or she must notify all others concerned in the commission of the crime that he or she is withdrawing. Second, he or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-61.)

If there is evidence that the defendant was merely present at the scene or only had knowledge that a crime was being committed, the court has a sua sponte duty to give the bracketed portion regarding presence. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911.)

If there is evidence that the defendant withdrew from participation in the crime, the court must give the bracketed portion regarding withdrawal. (*People v. Norton* (1958) 161 Cal.App.2d 399, 403; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–05.)

Framework for Instructions

Give instruction 500, Aiding and Abetting: General Principles, before this instruction.
When the prosecution's theory is that defendant is guilty either as an aider and abettor or as the direct perpetrator, insert the elements of the crime after the first sentence.
When the prosecution's only theory is that the defendant is guilty as an aider and abettor, insert the elements of the crime after "The perpetrator committed the crime," substituting "perpetrator" for "defendant." (See first bracketed paragraph.)

Related Instructions

If the prosecution charges non-target crimes under the Natural and Probable Consequences Doctrine, give instruction 502, Natural and Probable Consequences (All Crimes Charged) if both non-target and target crimes have been charged and instruction 503, Natural and Probable Consequences (Only Non-Target Crimes Charged) if only the non-target crimes have been charged.

If there is an issue regarding how long a crime continues for purposes of aiding and abetting liability, see the specific instructions in each crime category on this principle. (For example, instruction __ Robbery: Complete for Purposes of Aiding and Abetting.)

AUTHORITY

Definition of Principals ▸ Pen. Code, § 31.
Requirements for Aiding and Abetting ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560-561.
Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911.
Withdrawal ▸ *People v. Norton* (1958) 161 Cal.App.2d 399, 403; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405.

RELATED ISSUES

Accessory After the Fact
The prosecution must show that an aider and abettor intended to facilitate or encourage the target offense before or during its commission. If the defendant formed an intent to aid after the crime was completed, then he or she may be liable as an accessory after the fact. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1160–61 [get-away driver, whose intent to aid was formed after asportation of property, was an accessory after the fact, not an aider and abettor]; *People v. Rutkowsky* (1975) 53 Cal.App.3d 1069, 1072–73; *People v. Rodriguez* (1986) 42 Cal.3d 730, 760–61.)

Factors Relevant to Aiding and Abetting
Factors relevant to determining whether a person is an aider and abettor include: presence at the scene of the crime, companionship, and conduct before or after the offense. (*People v. Singleton* (1987) 196 Cal.App.3d 488, 492, citing *People v. Chagolla* (1983) 144 Cal.App.3d 422, 429 *People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Felony Murder
To prove guilt of felony murder as an aider and abettor, the prosecutor must prove that the defendant formed the intent to aid and abet before the commission of the killing. (*People* v. *Pulido* (1997) 15 Cal.4th 713, 724; *People* v. *Esquivel* (1994) 28 Cal.App.4th 1386, 1393–97; see instruction no. __, Felony-Murder: Aiding and Abetting.)

Perpetrator versus Aider and Abettor
For purposes of culpability the law does not distinguish between perpetrators and aiders and abettors; however, the required mental states that must be proved for each are different. One who engages in conduct that is an element of the charged crime is a

perpetrator, not an aider and abettor of the crime. (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1371.)

Presence Not Required
A person may aid and abet a crime without being physically present. (*People v. Bohmer* (1975) 46 Cal.App.3d 185, 199; see also *People v. Sarkis* (1990) 222 Cal.App.3d 23, 27.) Nor does a person have to physically assist in the commission of the crime; a person may be guilty of aiding and abetting if he or she intends the crime to be committed and instigates or encourages the perpetrator to commit it. (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1256.)

Principal Does Not Have to Be Convicted
Although the jury must find that the principal committed the crime aided and abetted, the fact that a principal has been acquitted of a crime or convicted of a lesser offense in a separate proceeding does not bar conviction of an aider and abettor. (*People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1092–1094; *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1066–1069; *People v. Rose* (1997) 56 Cal.App.4th 990.) A single Supreme Court case has created an exception to this principle and held that non-mutual collateral estoppel bars conviction of an aider and abettor when the principal was acquitted in a separate proceeding. (*People v. Taylor* (1974) 12 Cal.3d 686, 696-98.) In *Taylor*, the defendant was the 'get-away driver' in a liquor store robbery in which one of the perpetrators inadvertently killed another during a gun battle inside the store. In a separate trial, the gunman was acquitted of the murder of his co-perpetrator because the jury did not find malice. The court held that collateral estoppel barred conviction of the aiding and abetting driver, reasoning that the policy considerations favoring application of collateral estoppel were served in the case. The court specifically limited its holding to the facts, emphasizing the clear identity of issues involved and the need to prevent inconsistent verdicts. (See also *People v. Howard* (1988) 44 Cal.3d 375, 411–14 [court rejected collateral estoppel argument and reiterated the limited nature of its holding in *Taylor*.)

Specific Intent Crimes
If a specific intent crime is aided and abetted, the aider and abettor must share the requisite specific intent with the perpetrator. "[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (citations omitted.) (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) The perpetrator must have the requisite specific intent and the jury must be so instructed. (*People v. Patterson* (1989) 209 Cal.App.3d 610, [trial court erred in failing to instruct jury that perpetrator must have specific intent to kill]; *People v. Torres* (1990) 224 Cal.App.3d 763, 768–69.) And the jury must find that the aider and abettor shared the perpetrator's specific intent. (*People v. Acero* (1984) 161 Cal.App.3d

217, 224 [to convict defendant of aiding and abetting and attempted murder, jury must find that he shared perpetrator's specific intent to kill].)

502. Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)

The defendant is charged [in Counts _____] with _____ *[insert target offense]* **and _____** *[insert non-target offense]***.**

You must first decide whether the defendant is guilty of _____ *[insert target offense]***. If you find the defendant is guilty of this crime, you must then decide whether (he/she) is guilty of _____** *[insert non-target offense]***.**

Give instruction 501, Aiding and Abetting: Intended Crimes, omitting the first sentence and inserting elements of the target offense.

Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

If you decide the defendant is guilty of _____ *[insert target offense]***, then you must also decide whether (he/she) is guilty of _____** *[insert non-target offense]***.**

You may find the defendant guilty of _____ *[insert non-target offense]* **only if the prosecutor has proven beyond a reasonable doubt that:**

1. The defendant is guilty of _____ *[insert target offense]***.**

2. During the commission of the _____ *[insert target offense],* **the crime of _____** *[insert non-target offense]* **was committed.**

3. The commission of the _____ *[insert non-target offense]* **was a natural and probable consequence of the commission of the _____** *[insert target offense]***.**

The crime of _____ *[insert non-target offense]* **was committed if: _____** *[insert elements of non-target offense, substituting "perpetrator" for "defendant"]***.**

You must decide whether under all of the circumstances, a reasonable person in the defendant's position would have or should have known that the charged crime was a natural and probable consequence of the act the defendant aided and abetted.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-61.) The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. The court does not have to instruct on all potential target offenses supported by the evidence. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–68.)

The target offense is the crime that the parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target. When the court instructs on the commission of the non-target offenses by the perpetrator, the court should begin with the numbered elements of the crime and replace the word "defendant" with the words "a perpetrator." For example, if burglary is charged as a non-target offense, the court would instruct:

1. A perpetrator entered a (building/locked vehicle/_____); and

2. When (he/she) entered the (building/locked vehicle/_____), (he/she) intended to commit a (theft/rape/assault/_____ *[insert other felony]*)…

Order of Instructions
Give instruction 500, Aiding and Abetting: General Principles before this instruction. This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges both target and non-target crimes. If only non-target crimes are charged, give instruction 503.

Related Instructions
If there is an issue regarding when a crime is continuing for purposes of aiding and abetting, see the specific instruction in each offense category on this principle. (For example, instruction no. __ Robbery: Complete for Purposes of Aiding and Abetting)

AUTHORITY

Aiding and Abetting, defined ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560–61.
Natural and Probable Consequences, Reasonable Person Standard ▸ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.

COMMENTARY

In *People v. Hammond* (1986) 181 Cal.App.3d 463, 469, the court proposed that the jury be instructed that it must specifically determine whether the charged crimes were the "natural and probable consequences" of some other criminal act defendant knowingly and intentionally aided or encouraged. In *People v Cox* (1991) 53 Cal.3d 618, 668–69, the court held that the proposed *Hammond* instructions were only required on request. However, in *People v. Prettyman* (1996) 14 Cal.4th 248, 268, the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant. *Prettyman* essentially subsumes *Hammond*, requiring that the jury link the natural and probable consequences to the target offense. (See *People v. Williams* (1997) 16 Cal.4th 635, 673-675 [applying *Prettyman* instruction compels no different result than applying the *Hammond/Cox* instruction].) This instruction incorporates both the *Hammond* and *Prettyman* instructional requirements.

This instruction does not explicitly define the terms "natural" and "probable." No published case to date gives a clear definition of these terms nor holds that there is a sua sponte duty to define them. For further discussion of these terms, see *People v. Prettyman* (1996) 14 Cal.4th 248, 261; see also *Id.* at pp. 291-92 [dissent and concurring opinion by Justice Brown]; *People v. Croy* (1985) 41 Cal.3d 1, 12; *People* v. *Kauffman* (1907) 152 Cal. 331, 334; *People v. Cooper* (1991) 53 Cal.3d 1158, 1162; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 530; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1583; *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1052-53.

RELATED ISSUES

See generally, the related issues under instruction 501, Aiding and Abetting: Intended Crimes.

Lesser Included Offenses

The court has a duty to instruct on lesser included offenses that could be the natural and probable consequence of the intended offense when the evidence raises a question whether the greater offense is a natural and probable consequence of the original, intended criminal act. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-88 [aider and abettor may be found guilty of second degree murder under doctrine of natural and probable consequences although the principal was convicted of first degree murder].)

Natural and Probable Consequences Does Not Apply to Felony Murder

Under Penal Code section 189, the natural and probable consequences doctrine does not apply to aiding and abetting a felony murder. A person who aids and abets an enumerated felony that results in a killing is guilty of first degree murder. (See Pen. Code, § 189.) There is no requirement that the homicide be a natural and probable consequence of the enumerated felony. (*People v. Dawson* (1997) 60 Cal.App.4th 534, 543–46; *People v.*

Escobar (1996) 48 Cal.App.4th 999, 1018–20; but see *People v. Pulido* (1997) 15 Cal.4th 713 [the person must aid and abet the felony before the victim is killed]; see instruction __, Felony-Murder: Aiding and Abetting.)

Specific Intent – Non-Target Crimes

Before an aider and abettor may be found guilty of a specific intent crime under the natural and probable consequences doctrine, the jury must first find that the perpetrator possessed the required specific intent. (*People v. Patterson* (1989) 209 Cal.App.3d 610, 614 [trial court erroneously failed to instruct the jury that they must find that the perpetrator had the specific intent to kill necessary for attempted murder before they could find the defendant guilty as an aider and abettor under the 'natural and probable' consequences doctrine], disagreeing with *People v. Hammond* (1986) 181 Cal.App.3d 463 to the extent it held otherwise.) However, it is not necessary that the jury find that the aider and abettor had the specific intent; the jury must only determine that the specific intent crime was a natural and probable consequence of the original crime aided and abetted. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586–87.)

Target and Non-Target Offense May Consist of Same Act

Although generally, non-target offenses charged under the natural and probable consequences doctrine will be different and typically more serious criminal acts than the target offense alleged, they may consist of the same act with differing mental states. (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1463–66 [defendants were properly convicted of attempted murder as a natural and probable consequence of aiding and abetting the discharge of a firearm from a vehicle. Although both crimes consist of the same act, attempted murder requires a more culpable mental state].)

Target Offense Not Committed

The Supreme Court has left open the question whether a person may be liable under the natural and probable consequences doctrine for a non-target offense, if the target offense was not committed. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. 4.)

503. Natural and Probable Consequences (Only Non-Target Offense Charged)

The defendant is charged [in Count] _____ with _____ *[insert non-target offense].*

Before you may decide whether the defendant is guilty of _____ *[insert non-target offense]***, you must decide whether (he/she) is guilty of _____** *[insert all alleged target offense[s]]***.**

Give instruction 501, Aiding and Abetting: Intended Crimes, omitting the first sentence.

You may find the defendant committed _____ *[insert non-target offenses]* **only if the prosecutor has proven beyond a reasonable doubt that:**

1. The defendant is guilty of _____ *[insert all alleged target offenses]***.**

2. During the commission of the _____ *[insert target offense],* **the crime of _____** *[insert non-target offense]* **was committed.**

The crime of _____ *[insert non-target offense]* **was committed _____ if:** *[instruct on elements of the non-target offense, substituting "perpetrator" for "defendant"].*

3. The commission of the _____ *[insert non-target offense]* **was a natural and probable consequence of the commission of the _____** *[insert all alleged target offenses]***.**

You must decide whether under all of the circumstances, a reasonable person in the defendant's position would have or should have known that the charged crime was a natural and probable consequence of the act the defendant aided and abetted.

[The prosecution is alleging that the defendant originally intended to aid and abet either _____ *[insert target offense]* **or _____** *[insert alternative target offense]***.**
The defendant is guilty of _____ *[insert non-target offense]* **only if you decide that the defendant aided and abetted one of these crimes and that _____** *[insert non-target offense]* **was the natural and probable result of one of these crimes.**

However, you do not need to agree about which of these two crimes the defendant aided and abetted.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-61.) The court has a **sua sponte** duty to identify and instruct on any target offenses relied on by the prosecution as a predicate offense that are supported by the evidence. The court does not have to instruct on all potential target offenses supported by the evidence. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–68.)

The target offense is the crime the parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target. When the court instructs on the commission of the non-target by the perpetrator, the court should begin with the numbered elements of the crime and substitute "defendant" with "perpetrator." For example, if murder is charged as a non-target offense, the court should instruct:

1. The perpetrator caused the death of another person.
   AND
2. (He/She) caused the death by an act committed with malice aforethought.

Order of Instructions

Before this instruction, give instruction 500, Aiding and Abetting: General Principles. This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges only non-target crimes. If both target and non-target crimes are charged, give instruction 501.

AUTHORITY

Aiding and Abetting, defined ▸ *People v. Beeman* (1984) 35 Cal.3d 547, 560–61.
Natural and Probable Consequences, Reasonable Person Standard ▸ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.
Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911.
Withdrawal ▸ *People v. Norton* (1958) 161 Cal.App.2d 399, 403; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–05.
No Unanimity Required ▸ *People v. Prettyman* (1996) 14 Cal.4th 248, 267–268.

RELATED ISSUES

See generally, the related issues section under instructions 501, Aiding and Abetting, and 502, Aiding and Abetting: Natural and Probable Consequences.

520. Accessories

The defendant is charged [in Count _____] with being an accessory to a felony.

You may find the defendant guilty of being an accessory to a felony only if the prosecutor has proven beyond a reasonable doubt that:

1. Another person, whom I will call the perpetrator, committed a felony.

2. The defendant knew that the perpetrator had committed a felony or that the perpetrator had been charged with or convicted of a felony.

3. After the felony had been committed, the defendant either harbored, concealed, or aided the perpetrator.

AND

4. When the defendant acted, (he/she) intended that the perpetrator avoid or escape arrest, trial, conviction, or punishment.

[The perpetrator committed the felony of _____ *[insert felony]* **if:** _____ *[insert elements of felony, substituting "perpetrator" for "defendant"]***.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. There is no sua sponte duty to instruct on the underlying felony unless it is unclear that a felony occurred. However, the defendant is entitled to such an instruction on request. (*People v. Shields* (1990) 222 Cal.App.3d 1, 4–5.)

AUTHORITY

Elements ▸ Pen. Code, § 32; *People v. Duty* (1969) 269 Cal.App.2d 97, 100–01.

COMMENTARY

There is no authority defining "harbor." The committee therefore kept "harbor" in the instruction. *Black's Law Dictionary* defines harbor as "[t]he act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien." (7th ed., 1999, at p. 721.) The court may wish to give an additional definition depending on the facts of the case.

RELATED ISSUES

Accessory and Principal to the Same Crime

There is a split of authority on whether a person may ever be guilty as an accessory and a principal to the same crime. Early case law held that it was not possible to be convicted of both because either logic or policy prohibited it. (*People v. Prado* (1977) 67 Cal.App.3d 267, 271-73; *People v. Francis* (1982) 129 Cal.App.3d 241, 246–53.) However, a later case disputed both of these cases and held "that there is no bar to conviction as both principal and accessory where the evidence shows distinct and independent actions supporting each crime." (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1324, disapproved on other grounds in *People v. Prettyman* (1996) 14 Cal.4th 248; *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816; but see *People v. Nguyen* (1993) 21 Cal.App.4th 518, 536 [suggesting in dicta that a person guilty as a principal can never be guilty as an accessory].)

Awareness of the Commission of Other Crimes Insufficient to Establish Guilt as an Accessory

Awareness that a co-perpetrator has committed other crimes is not enough to find a person guilty as an accessory to those crimes unless there is evidence that the person intentionally did something to help the co-perpetrator avoid or escape arrest, trial, conviction or punishment for those offenses. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 537 [defendants' convictions as accessories to sexual assaults committed by co-perpetrators in the course of a robbery reversed; no evidence existed that defendants did anything to help co-perpetrators escape detection].)

Passive Nondisclosure

Although a person is not guilty of being an accessory if he or she fails or refuses to give incriminating information about a third party to the police, providing a false alibi for that person violates the accessory statute. (*People v. Duty* (1969) 269 Cal.App.2d 97, 103-04.)

530. Solicitation: Elements

The defendant is charged [in Count __] with soliciting the crime of _____ *[insert target offense]***.**

You may find the defendant guilty of solicitation only if the prosecutor has proven beyond a reasonable doubt that:

> **1. The defendant asked [or _____** *[insert other synonyms for solicit as appropriate]***] another person to commit [or join in the commission of] the crime of _____** *[insert target offense]***.**
>
> **AND**
>
> **2. The defendant intended that the crime of _____** *[insert target offense]* **be committed.**

The defendant intended that the person commit _____ if (he/she) intended that:

> *[Insert the elements of the crime substituting "person" for "defendant" and changing past tense to present tense.]*

Alternative A – Corroboration
The crime of solicitation must be proven by the testimony of one witness and corroborating evidence.

Alternative B – Corroboration
The crime of solicitation must be proven by the testimony of two witnesses or by the testimony of one witness and corroborating evidence.

Corroborating evidence is evidence that (1) tends to connect the defendant with the commission of the crime and (2) is independent of the witness who testified about the fact of the solicitation. Corroborating evidence need not establish each element of the crime or prove guilt by itself. Corroborating evidence may include the defendant's acts, statements, or conduct, or any other circumstance that tends to connect (him/her) to the crime.

[A person is guilty of solicitation even if the crime solicited is not completed or even started. The person solicited does not have to agree to commit the crime.]
[If you find the defendant guilty of solicitation, you must decide how many crimes (he/she) solicited. When deciding this question, consider the following factors:

1. Were the crimes solicited part of a plan with a single objective or motive or did each crime solicited have a different objective or motive?
2. Were the crimes solicited to be committed at the same time?
3. Were the crimes solicited to be committed in the same place?
4. Were the crimes solicited to be committed in the same way?
5. Was the payment for the crimes solicited one amount or different amounts for each crime solicited?

Consider all of these factors when deciding whether the defendant's alleged acts were a single crime or _____ *[insert number of solicitations alleged by prosecution]* **separate crimes of solicitation.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Although "ask" has been approved as an accurate definition of solicit (*People v. Gordon* (1975) 47 Cal.App.3d 465, 472), a blank has also been provided in element one to permit substituting other words for "solicit." Other approved language includes: to entreat, implore, importune, to make petition to, to plead for, to try to obtain, to request, or to offer or invite another to commit a crime. (*People v. Phillips* (1945) 70 Cal.App.2d 449, 453; *People v. Sanchez* (1998) 60 Cal.App.4th 1490, 1494; *Laurel v. Superior Court for Los Angeles County* (1967) 255 Cal.App.2d 292, 298.)

Penal Code section 653f lists those crimes that may be the target of a solicitation. If the target crime is listed in subdivision (a) or (b) of that section, insert the bracketed portion "[or join in the commission of]." If the target crime is listed in subdivision (c), (d), or (e), of the section, omit that bracketed portion.

Insert the elements of the target crime in the space provided. (See *People v. Baskins* (1946) 72 Cal.App.2d 728, 732.) If the crime is solicitation to commit murder, do not instruct on implied malice murder. (*People v. Bottger* (1983) 142 Cal.App.3d 974, 980–81.)

When instructing on the corroboration requirements, if the target crime is listed in subdivision (d) or (e) of section 653f, give Alternative A. If the target crime is listed in subdivision (a), (b), or (c) of section 653f, give Alternative B.

Authority is divided on whether the judge or jury is to determine the number of solicitations where multiple crimes were solicited by the defendant. The bracketed portion at the end of the instruction should be given concerning this issue if multiple

solicitations have been charged and the trial court determines that this is a question for the jury. (Compare *People v. Davis* (1989) 211 Cal.App.3d 317, 322-23 with *People v. Morocco* (1987) 191 Cal.App.3d 1449, 1454.)

AUTHORITY

Elements ▸ Pen. Code, § 653f.
Solicitation, Defined ▸ *People v. Gordon* (1975) 47 Cal.App.3d 465, 472; *People v. Sanchez* (1998) 60 Cal.App.4th 1490, 1494.

RELATED ISSUES

Crime Committed Outside of California
The solicitation of a person in California to commit a felony outside the state constitutes solicitation. (*People v. Burt* (1955) 45 Cal.2d 311, 314.)

Solicitation of Murder
When defining the crime of murder, in the case of a solicitation of murder, the trial court must not instruct on implied malice as an element of murder. Because the "crime of solicitation to commit murder occurs when the solicitor purposely seeks to have someone killed and tries to engage someone to do the killing," the person must have express malice to be guilty of the solicitation. (*People v. Bottger* (1983) 142 Cal.App.3d 974, 981.) An instruction on murder that includes implied malice as an element has the potential of confusing the jury. (*Ibid*.)

531. Solicitation of a Minor

The defendant is charged [in Count __] with soliciting a minor to commit the crime of _____ *[insert target offense]***.**

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant voluntarily asked, encouraged, [induced], [or] [intimidated] a minor to commit the crime of _____ *[insert target offense]***.**

AND

2. **(He/She) intended that the minor commit the crime of _____** *[insert target offense]***.**

[3. At the time of the offense, the minor was 16 or 17 years old, and the defendant was at least 5 years older than the minor.]

The defendant intended that the person commit _____ if (he/she) intended that:

[Insert the elements of the crime substituting "person" for "defendant" and changing past tense to present tense.]

A minor is a person under the age of 18.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Penal Code section 653j lists those offenses that may be the target of a solicitation of a minor.

If the minor is 16 or 17 years old, the jury must find that the defendant is at least 5 years older and the court must instruct **sua sponte** on bracketed element 3. (Pen. Code, § 653j (a).)

AUTHORITY

Elements ▸ Pen. Code, § 653j.

Series 600 – Defenses

600. Alibi
610. Duress or Threats
615. Necessity
616. Necessity: Escape from Prison or County Jail
620. Accident and Misfortune
640. Unconsciousness
650. Voluntary Intoxication
660. Mistake of Fact
661. Mistake of Law
680. Statute of Limitations
690. Insanity: Determination, Effect of Verdict

600. Alibi

The defendant is not guilty of _____ *[insert crime]* **if (he/she) was not present when the crime was committed.**

If you have a reasonable doubt that the defendant was present when the crime[s] (was/were) committed, you must find (him/her) not guilty.

[However, if the evidence establishes beyond a reasonable doubt that the defendant (aided and abetted the commission of/was a co-conspirator in the commission of) the crime [of_____ *[insert crime]***], (his/her) presence is not required.]**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on alibi. (*People v. Freeman* (1978) 22 Cal.3d 434, 437–38; *People v. Alcala* (1992) 4 Cal.4th 742, 803–04.) The court must give this instruction on request when evidence of alibi has been introduced. (*People v. Whitson* (1944) 25 Cal.2d 593, 603 [no sua sponte duty even if substantial evidence has been introduced by the defense]; *People v. Freeman* (1978) 22 Cal.3d 434, 437–38.)

The defendant is not entitled to an instruction on alibi if the prosecution does not rely on the defendant's presence at the commission of the crime to establish culpability. (*People v. Manson* (1976) 61 Cal.App.3d 102, 211 [in prosecution for conspiracy and murder, defendant was not entitled to a jury instruction on alibi, where the prosecution never contended he was present at the time of the actual commission of any homicide and his presence was not a requirement for culpability].) However, if the prosecution's theory is that the defendant was either at the scene or alternatively, aided and abetted or conspired, without being present, the last bracketed paragraph should be given. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 26–28. If this paragraph is given, the court has a **sua sponte** duty to instruct on aiding and abetting. (*Ibid.* [court properly instructed that alibi was not a defense in an aiding and abetting case, but failed to define aiding and abetting].)

AUTHORITY

Burden of Proof ▸ *In re Corey* (1964) 230 Cal.App.2d 813, 828.
Alibi: Aiding and Abetting ▸ *People v. Sarkis* (1990) 222 Cal.App.3d 23, 26–28.

RELATED ISSUES

Scrutinizing Alibi Evidence

Alibi evidence need only raise a reasonable doubt that the defendant was not present at the scene of the crime. It is therefore error to instruct the jury (1) that an alibi must be proved by a preponderance of the evidence, (2) that alibi evidence must convince the jury of the defendant's innocence, (3) that the jury must give less credit to the testimony of alibi witnesses, or (4) that the jury must give more careful scrutiny or less weight to alibi evidence than to other evidence. (*People v. Costello* (1943) 21 Cal.2d 760, 763.)

610. Duress or Threats

The defendant is not guilty of _____ *[insert crime]* **if (he/she) acted under duress.**

The defendant acted under duress if, because of threat or menace, (he/she) believed that (his/her/another person's) life would be in immediate danger if (he/she) refused a demand or request to commit the crime. The demand or request may have been express or implied.

The defendant's belief that (he/she/another person) was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed.

The prosecutor must prove beyond a reasonable doubt that the defendant did not commit the crime because of duress. If the prosecutor fails to do so, you must find the defendant not guilty.

[A threat of future harm is not sufficient; the danger must have been immediate.]

[This defense does not apply to the crime of _____ *[insert crime(s) punishable by death]***.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on this defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally]; *People v. Sedeno* (1974) 10 Cal.3d 703, 716–17, overruled by *Breverman, supra*, on a different point; see also *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–67 [no sua sponte duty because evidence did not support complete duress].)

As provided by statute, duress is not a defense to crimes punishable by death. (Pen. Code, § 26(6).) If such a crime is charged, the court should instruct, using the last bracketed paragraph, that the defense is not applicable to that count.

Related Instructions
The defense of duress applies when the threat of danger is immediate and accompanied by a demand, either direct or implied, to commit the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 899–901; *People v. Steele* (1988) 206 Cal.App.3d 703, 706.) If the threat is of future harm or there is no implicit or explicit demand that the defendant commit the crime, the evidence may support instructing on the defense of necessity. (See instruction 615, Necessity.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 26(6).
Burden of Proof ▸ *People v. Graham* (1976) 57 Cal.App.3d 238, 240.

RELATED ISSUES

Great Bodily Harm
Penal Code section 26(6) discusses life-endangering threats and several older cases have outlined the defense of duress in the literal language of the statute. However, some cases have concluded that fear of great bodily harm is sufficient to raise this defense. (Compare *People v. Hart* (1950) 98 Cal.App.2d 514, 516 and *People v. Lindstrom* (1932) 128 Cal.App. 111, 116 with *People v. Otis* (1959) 174 Cal.App.2d 119, 124; see also 1 Witkin, Cal. Criminal Law (2d ed. 1988) Fear of Bodily Harm, § 235, p. 271 [discussing this split]; but see *People v. Subielski* (1985) 169 Cal.App.3d 563, 566–67 [court rejects defense of duress because evidence showed defendant feared only a beating].) It is clear, however, that threats of great bodily harm are sufficient in the context of necessity. (*People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831; *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 27.)

Third Person Threatened
In *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 21–25, the court held that the defenses of necessity and duress may be based on threats of harm to a third party. Although *Pena* is regarded as a necessity case, its discussion of this point was based on out-of-state and secondary authority involving the defense of duress. (See *People v. Heath* (1989) 207 Cal.App.3d 892, 898 [acknowledging that though *Pena* uses the terms necessity and duress interchangeably, it is really concerned with the defense of necessity].) No other California cases discussing threats made to a third party and duress were found. (See also 1 Witkin, Cal. Criminal Law (2d ed. 1988) Threat of Harm to Another, § 236, pp. 271–72 [discussing *Pena* on this point].)

615. Necessity

The defendant is not guilty of _____ *[insert crime]* **if (he/she) acted because of legal necessity. To establish this defense, the defendant must prove that it is more likely than not that:**

1. (He/She) acted to prevent a harm or evil to (himself/herself/another person.) The harm or evil must have been significant and physical.

2. (He/She) had no adequate alternative.

3. The potential for harm from the defendant's acts was not out of proportion to the harm or evil with which (he/she/another person) was threatened.

4. When the defendant acted, (he/she) actually believed that the act was necessary to prevent the threatened harm or evil.

5. A reasonable person would also have believed that the act was necessary under the circumstances.

AND

6. The defendant did not substantially contribute to the need to act.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on necessity when there is sufficient evidence supporting each of the factors establishing the defense. (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 [no duty to instruct sua sponte where evidence did not, as a matter of law, support this defense]; see *In re Eichorn* (1998) 69 Cal.App.4th 382, 389 [defendant requested instruction on necessity and court, citing *Pepper, supra*, held that "an instruction on necessity was required," where sufficient evidence established the defense].)

Related Instructions

If the threatened harm was immediate and accompanied by a demand to commit the crime, the defense of duress may apply. (See instruction, 610, Duress or Threats.)

AUTHORITY

Instructional Requirements ▸ *People v. Pena* (1983) 149 Cal.App.3d Supp. 14; *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135–36.

Burden of Proof ▸ *People v. Waters* (1985) 163 Cal.App.3d 935, 938; *People v. Condley* (1977) 69 Cal.App.3d 999, 1008.

RELATED ISSUES

Abortion Protests

The defense of necessity is not available to one who attempts to interfere with another person's exercise of a constitutional right (e.g., demonstrators at an abortion clinic). (*People v. Garziano* (1991) 230 Cal.App.3d 241, 244.)

Economic Necessity

Necessity caused by economic factors is valid under the doctrine. A homeless man was entitled to an instruction on necessity as a defense to violating an ordinance prohibiting sleeping in park areas. Lack of sleep is arguably a significant evil and his lack of economic resources prevented a legal alternative to sleeping outside. (*In re Eichorn* (1998) 69 Cal.App.4th 382, 389–91.)

Medical Necessity

There is a common law and statutory defense of medical necessity. The common law defense contains the same requirements as the general necessity defense. (*See People v. Tribbet* (1997) 56 Cal.App.4th 1532, 1538.) The statutory defense relates specifically to the use of marijuana and is based on Health and Safety Code section 11362.5, the "Compassionate Use Act."

616. Necessity: Escape from Prison or County Jail

The defendant is not guilty of (escape/attempted escape) from (state prison/county jail) if (he/she) acted because of legal necessity. To establish this defense, the defendant must prove it is more likely than not that:

1. The defendant faced a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future.

2. (He/She) had no opportunity to complain to the authorities [or there was such a history of official inaction that a reasonable person in the same circumstances would have believed that a complaint would have been useless].

3. The defendant had no opportunity to obtain protection from a court.

4. (He/She) did not use force or violence against a (prison/jail) employee or another innocent person in the (escape/attempted escape).

AND

Alternative A – report to authorities

5A. (He/She) reported to the appropriate authorities as soon as (he/she) was safe from the immediate threat.

Alternative B – intent to report

5B. (**He/She) intended to report to the appropriate authorities as soon as (he/she) was safe from the immediate threat, but was apprehended first.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on necessity when there is sufficient evidence supporting each of the factors establishing the defense. (*People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–32.)

Related Instructions

When necessity is raised as a defense to crimes other than escape, the court should give instruction 615, Necessity.

AUTHORITY

Instructional Requirements ▸ *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–32.
Burden of Proof ▸ *People v. Waters* (1985) 163 Cal.App.3d 935, 938; *People v. Condley* (1977) 69 Cal.App.3d 999, 1013.

RELATED ISSUES

See generally, the related issues section under instruction 615, Necessity.

620. Accident and Misfortune

Intent Crimes

The defendant is not guilty of _____ *[insert crime]* **if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead through accident or misfortune. You may not find the defendant guilty of _____** *[insert crime]* **unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.**

Criminal Negligence Crimes

The defendant is not guilty of _____ *[insert crime]* **if (he/she) acted [or failed to act] through accident or misfortune without criminal negligence. You may not find the defendant guilty of _____** *[insert crime]* **unless you are convinced beyond a reasonable doubt that (he/she) acted with criminal negligence.**

BENCH NOTES

Instructional Duty

The court must give this instruction on request when evidence of accident or misfortune is introduced and the defendant requests an instruction on this defense. (*People v. Acosta* (1955) 45 Cal.2d 538, 544.)

When instructing on the defense of accident and misfortune, only the mental state relevant to the crime charged should be included in the instruction. (*People v. Lara* (1996) 44 Cal.App.4th 102, 109 [trial court erred in instructing on criminal negligence in battery case because battery is a general intent crime].) The first paragraph is given if the defense is raised to a general or specific intent crime. The second paragraph is given if the defense is raised to a crime that is committed by criminal negligence. In either case, the court should insert the specific crime in the space provided. If both intent and negligence crimes are charged, instruct with both paragraphs and insert the crimes in their respective spaces.

Related Instructions

If murder is charged, see instruction 715, Excusable Homicide: Accident and Misfortune.

AUTHORITY

Instructional Requirements ▸ Pen. Code, §§ 26(5), 195.
Burden of Proof ▸ *People v. Black* (1951) 103 Cal.App.2d 69, 79; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–55.

Criminal Negligence ‣ *People v. Lara* (1996) 44 Cal.App.4th 102, 109.

RELATED ISSUES

Misfortune Defined
"'Misfortune' when applied to a criminal act is analogous [to] the word 'misadventure' and bears the connotation of accident while doing a lawful act." (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308.)

640. Unconsciousness

The defendant is not guilty of _____ *[insert crime]* **if (he/she) acted while legally unconscious. Under the law, someone is unconscious when he or she is not aware of his or her actions. [Someone may be unconscious even though able to move.]**

Unconsciousness may be caused by a blackout, an epileptic seizure, involuntary intoxication, somnambulism (sleepwalking), or some other similar condition.

The prosecutor must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. Unless you are convinced beyond a reasonable doubt, that the defendant was conscious when (he/she) acted, you must find him/her not guilty.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on unconsciousness if the defendant is relying on this defense or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally];*People v. Sedeno* (1974) 10 Cal.3d 703, 716–17 [duty to instruct on unconsciousness], overruled by *Breverman*, *supra*, on different grounds.)

Because there is a presumption that a person who acts conscious is conscious (*People v. Hardy* (1948) 33 Cal.2d 52, 63–64), the defendant must produce sufficient evidence raising a reasonable doubt that he or she was conscious before an instruction on unconsciousness may be given. (*Ibid.*; *People v. Kitt* (1978) 83 Cal.App.3d 834, 842 [presumption of consciousness goes to the defendant's burden of producing evidence].)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 26(4); *People v. Stewart* (1976) 16 Cal.3d 133, 140.

Burden of Proof ▸ Pen. Code, § 607; *People v. Hardy* (1948) 33 Cal.2d 52, 64; *People v. Cruz* (1978) 83 Cal.App.3d 308, 330–31.

Unconsciousness Defined ▸ *People v. Newton* (1970) 8 Cal.App.3d 359, 376; *People v. Heffington* (1973) 32 Cal.App.3d 1, 9.

Examples of Unconscious States:

- Somnambulism or Delirium ▸ *People v. Methever* (1901) 132 Cal. 326, 329, overruled on other grounds in *People v. Gorshen* (1953) 51 Cal.2d 716.
- Blackouts ▸ *People v. Cox* (1944) 67 Cal.App.2d 166, 172.
- Epileptic Seizures ▸ *People v. Freeman* (1943) 61 Cal.App.2d 110, 115-16.
- Involuntary Intoxication ▸ *People v. Heffington* (1973) 32 Cal.App.3d 1, 8.

COMMENTARY

The committee did not include an instruction on the presumption of consciousness. There is a judicially created presumption that a person who acts conscious is conscious. (*People v. Hardy* (1948) 33 Cal.2d 52, 63–64.) Although an instruction on this presumption has been approved, it has been highly criticized. (See *People v. Kitt* (1978) 83 Cal.App.3d 834, 842–43 [acknowledging instruction and suggesting modification]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 332 [criticizing CALJIC instruction for failing to adequately explain the presumption].)

The effect of this presumption is to place on the defendant a burden of producing evidence to dispel the presumption. (*Cruz, supra,* at pp. 330–31; *Kitt, supra,* at p. 842; and see *People v. Babbitt* (1988) 45 Cal.3d 660, 689–96 [an instruction on this presumption "did little more than guide the jury as to how to evaluate evidence bearing on the defendant's consciousness and apply it to the issue."].) However, if the defendant produces enough evidence to warrant an instruction on unconsciousness, the rebuttable presumption of consciousness has been dispelled and no instruction on its effect is necessary. The committee, therefore, concluded that no instruction on the presumption of consciousness was needed.

RELATED ISSUES

Inability to Remember

Generally, a defendant's inability to remember or his hazy recollection does not supply an evidentiary foundation for a jury instruction on unconsciousness. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 10); *People v. Sameniego* (1931) 118 Cal. App. 165, 173 ["The inability of a defendant . . . to remember . . . is of such common occurrence and so naturally accountable for upon the normal defects of memory, or, what is more likely, the intentional denial of recollection, as to raise not even a suspicion of declarations having been made while in an unconscious condition."].) In *People v. Coston* (1947) 82 Cal.App.2d 23, 40–41, the court stated that forgetfulness may be a factor in unconsciousness; however, "there must be something more than [the defendant's] mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act."

Two cases have held that a defendant's inability to remember warrants an instruction on unconsciousness. (*People v. Bridgehouse* (1956) 47 Cal.2d 406 and *People v. Wilson* (1967) 66 Cal.2d 749, 761–62.) Both cases were discussed in *People v. Heffington* (1973) 32 Cal.App.3d 1, but the court declined to hold that *Bridgehouse* and *Wilson* announced an "ineluctable rule of law" that "a defendant's inability to remember or his 'hazy' recollection supplies an evidentiary foundation for a jury instruction on unconsciousness." (*Id*. at p. 10.) The court stated that, "[b]oth [cases] were individualized decisions in which the court examined the record and found evidence, no matter how incredible, warranting the instruction." (*Ibid*.)

Intoxication – Involuntary versus Voluntary

Unconsciousness due to involuntary intoxication is a complete defense to a criminal charge under Penal Code section 26 subdivision (4). (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8.) Unconsciousness due to voluntary intoxication is governed by Penal Code section 22, rather than section 26, and is not a defense to a general intent crime. (*People v. Chaffey* (1994) 25 Cal.App.4th 852, 855.)

Mental Condition

A number of authorities have stated that a decisional conflict exists in California over whether an unsound mental condition can form the basis of a defense of unconsciousness. (See *People v. Lisnow* (1978) 88 Cal.App.3d Supp. 21, 23; 1 Witkin Cal. Criminal Law (2d ed. 1988) Unconsciousness, § 214, pp. 246–48 [noting the split and concluding that the more recent cases permit the defense for defendants of unsound mind]; Annot., Automatism or Unconsciousness as a Defense or Criminal Charge (1984) 27 A.L.R.4th 1067, § 3(b) fn. 7.)

650. Voluntary Intoxication

The defendant is not guilty of _____ *[insert crime]* **if he did not (intend to _____/know _____ / _____** *[insert specific mental state]*] **because (he/she) was voluntarily intoxicated when (he/she) acted.**

[Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

If you have a reasonable doubt that the defendant had the required intent [or mental state] when (he/she) acted, you must find (him/her) not guilty of _____ *[insert crime]***.**

[Voluntary intoxication is not a defense to _____ *[insert charged general intent crimes]***.]**

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (*People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary intoxication and its effect on the defendant's ability to form specific mental states. (Pen. Code, § 22; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–86 [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–34 [relevant to mental state in aiding and abetting].)

Voluntary intoxication may not be considered for general intent crimes. (*People v. Menodza* (1998) 18 Cal.4th 1114, 1127–28; see also *People v. Hood* (1969) 1 Cal.3d 444, 451 [applying specific v. general intent analysis and holding that assault type crimes are general intent; subsequently superceded by amendments to Penal Code § 22 on a different point].)

If both specific and general intent crimes are charged, the court must specify those general intent crimes in the last bracketed paragraph and instruct the jury that voluntary intoxication is not a defense to those crimes. (*People v. Aguirre* (1995) 31 Cal.App.4th 391, 399–402; *People v. Rivera* 162 Cal.App.3d 141, 145–46.)

The second paragraph is given if there is an issue about the voluntariness of defendant's intoxication.

Related Instructions
Murder: Voluntary Intoxication, instruction __ (*People v. Castillo* (1997) 16 Cal.4th 1009).
Aiding and Abetting: Voluntary Intoxication, instruction __ (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–34).
Involuntary Intoxication, instruction __ (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–32; *People v. Velez* (1985) 175 Cal.App.3d 785, 795).

AUTHORTIY

Instructional Requirements ‣ Pen. Code, § 22; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.
Burden of Proof ‣ *People v. Saille* (1991) 54 Cal.3d 1103, 1106.

RELATED ISSUES

Intoxication Based on Mistake of Fact is Involuntary
Intoxication resulting from trickery is not "voluntary." (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 [defendant drank punch not knowing it contained hallucinogens; court held his intoxication was result of trickery and mistake and involuntary].)

Unconsciousness Based on Voluntary Intoxication is Not a Complete Defense
Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8.) Unconsciousness caused by voluntary intoxication is governed by Penal Code section 22, rather than by section 26 and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 423 ["if the intoxication is voluntarily induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication."].)

660. Mistake of Fact

The defendant is not guilty of _____ *[insert crime]* **if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.**

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ *[insert crime]***.**

If you find that the defendant believed that _____ *[insert alleged mistaken facts]* **[and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____** *[insert crime]***.**

If you have a reasonable doubt whether the defendant had the specific intent or mental state required for _____ *[insert crime]***, you must find (him/her) not guilty of that crime.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on mistake of fact if substantial evidence supports this defense. (*People v. Lucero* (1988) 203 Cal.App.3d 1011, 1018.) This instruction also must be given on request. (*People v. Goodman* (1970) 8 Cal.App.3d 705, 709.)

Depending on the crime charged, the trial court must instruct with the bracketed language requiring that defendant's belief be both actual and reasonable. The following crimes require that the defendant's belief be reasonable and actual and require this bracketed language:

Assault ‣ *People v. Rivera* (1984) 157 Cal.App.3d 736.
Bigamy ‣ *People v. Vogel* (1956) 46 Cal.2d 798, 803.
Kidnapping ‣ *People v. Barnett* (1998) 17 Cal.4th 1044.
Trespass and Burglary ‣ *People v. Irizarry* (1995) 37 Cal.App.4th 967, 975.
Rape ‣ *People v. Mayberry* (1975) 15 Cal.3d 143, 153–59.
Statutory Rape ‣ *People v. Hernandez* (1964) 61 Cal.2d 529, 535.
Molesting a Minor ‣ *People v. Atchinson* (1978) 22 Cal.3d 181.

Contributing to the Delinquency of a Minor ‣ *People v. Atchinson* (1978) 22 Cal.3d 181.
Oral Copulation With a Minor ‣ *People v. Peterson* (1981) 126 Cal.App.3d 396.
Soliciting, Inducing, Encouraging, and Intimidating a Minor to Knowingly Use a Narcotic in Violation of Health & Saf. Code, § 11353 ‣ *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036.

The following type of crimes require that the defendant only actually believe in the mistake and the bracketed language on reasonableness is not required:

Theft Crimes ‣ *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1.

Mistake of fact about a person's age is not a defense to the following crimes:

Involuntary Manslaughter ‣ *People v. Velez* (1983) 144 Cal.App.3d 558, 565–66.
Furnishing Marijuana to a Minor ‣ Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–62.
Selling Narcotics to a Minor ‣ Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407 [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor].
Aggravated Kidnapping of a Child Under the Age of 14 ‣ Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112.
Lewd and Lascivious Conduct with a Child Under the Age of 14 ‣ Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638.

AUTHORITY

Instructional Requirements ‣ Pen. Code, § 26(3)
Burden of Proof ‣ *People v. Mayberry* (1975) 15 Cal.3d 143, 157.

RELATED ISSUES

Mistake of Fact Based On Involuntary Intoxication
A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–33.) In *Scott* the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would

not have been available if defendant's mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–33; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084. In *Gutierrez,* the defendant was charged with inflicting cruel injury upon a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*Id*. at p. 1083.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083-1084.)

661. Defenses: Mistake of Law

It is no defense to the crime of _____ *[insert crime]* **that the defendant did not know (he/she) was breaking the law.**

BENCH NOTES

Instructional Duty

It is no defense to a crime that the defendant did not realize he or she was breaking the law when he or she acted. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.) This is true even when the defendant claims he or she was acting in good faith on the mistaken advice of counsel. (*People v. Snyder* (1982) 32 Cal.3d 590 [defendant's mistaken belief, based on attorney's advice, that prior conviction was a misdemeanor no defense to felon in possession of a firearm]; *People v. McCalla* (1923) 63 Cal.App. 783, 795 [reliance on advice of counsel not a defense to illegally issuing an instrument under Corporate Securities Act]; *People v. Honig* (1996) 48 Cal.App.4th 289, 347–48 ["the defense of action taken in good faith, in reliance upon the advice of a reputable attorney that it was lawful, has long been rejected. The theory is that this would place the advice of counsel above the law, and would also place a premium on counsel's ignorance or indifference to the law"]; *People v. Smith* (1966) 63 Cal.2d 779, 792–93 [no defense to felony murder that defendant did not know that entering a store intending to pass a forged check constituted burglary in California].)

Related Instructions

A mistaken belief about legal status or rights may be a defense to a specific intent crime if the mistake is held in good faith. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137 [defendants' belief that they had a legal right to use clients' gold reserves to buy future contracts could be a defense if held in good faith]; (*People v. Stewart* (1976) 16 Cal.3d 133, 140 [defendant's good faith belief that he was legally authorized to use property could be defense to embezzlement]; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–70 [defendant's belief, if held in good faith, that out-of-state custody order was not enforceable in California could have been basis for defense to violating a child custody order]; see also 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 219.) Although concerned with knowledge of the law, a mistake about legal status or rights is a mistake of fact, not a mistake of law. (See instruction 660, Mistake of Fact.)

AUTHORITY

Instructional Requirements ▸ *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137; *People v. Stewart* (1976) 16 Cal.3d 133, 140; *People v. Flora* (1991) 228 Cal.App.3d 662, 669–70.

RELATED ISSUES

Good Faith Reliance on Statute or Regulation

Good faith reliance on a facially valid statute or administrative regulation (which turns out to be void) may be considered an excusable mistake of law. Additionally, a good faith mistake-of-law defense may be established by special statute. (See 1 Witkin, Cal. Criminal Law (2d ed. 1988) Reliance on Statute, § 220, pp. 254–55.)

680. Statute of Limitations

A defendant may be convicted of _____ *[insert crime]* **only if the prosecution began within __ years of the date the crime (was committed/was discovered/should have been discovered). The present prosecution began on _____** *[insert date]***.**

[A crime "should have been discovered" when the (victim/law enforcement officer) was aware of facts that would have alerted a reasonably diligent (person/law enforcement officer) in the same circumstances to the fact that a crime may have been committed.]

The prosecutor must prove that it is more likely than not that prosecution of this case began within the required time.

[If the prosecutor has proven that it is more likely than not that the defendant was outside of California for a period of time, you must not include that period [up to three years] in determining whether the prosecution began on time.]

BENCH NOTES

Instructional Duty

It is an open question as to whether the statute of limitations is an affirmative defense, which is forfeited if a defendant fails to raise it before or at trial, or if it is a jurisdictional issue, which can be raised at any time. (*People v. Cowan* (1996) 14 Cal.4th 367, 374 [addressing the issue of whether a defendant can knowingly waive the statute of limitations and plead guilty to a lesser time-barred offense].) If the defendant does raise it at trial, general instructional principles mandate that the court has a **sua sponte** duty to instruct on it if the defendant is relying on such a defense or there is substantial evidence supporting it. (See generally *People v. Stewart* (1976) 16 Cal.3d 133, 140 [discussing duty to instruct on defenses].)

The state has the burden of proving by a preponderance of the evidence that the prosecution is not barred by the statute of limitations. (*People v. Crosby* (1962) 58 Cal.2d 713, 725; *People v. Zamora* (1976) 18 Cal.3d 538, 565, fn 27.)

For most crimes, the statute begins to run when the offense is committed. If the crime is a fraud-related offense and included in Penal Code section 803 the statute begins to run after the completion of or discovery of the offense, whichever is later. (Pen. Code, §§ 801.5, 803.) Courts interpreting the date of discovery provision have imposed a due

diligence requirement on investigative efforts. (*Zamora, supra,* 18 Cal.3d at p. 561; *People v. Lopez* (1997) 52 Cal.App.4th 233, 246.) If one of the crimes listed in Section 803 is at issue the court should instruct using the "discovery" language.

If there is a factual issue about when the prosecution started, the court should instruct that the prosecution begins when (1) an information or indictment is filed, (2) a complaint is filed charging a misdemeanor or infraction, (3) a case is certified to superior court, or (4) an arrest warrant or bench warrant is issued describing the defendant with the same degree of particularity required for an indictment, information, or complaint. (Pen. Code, § 804.)

Limitation Periods

No limitations period (Pen. Code, § 799):

Embezzlement of public funds and crimes punishable by death or by life imprisonment.

Six-year period (Pen. Code, § 800):

Felonies punishable for eight years or more, unless otherwise specified by statute.

Five-year period (Pen. Code, § 801.6):

All other crimes against elders and dependent adults.

Four-year period (Pen. Code, §§ 801.5, 803(c)):

Fraud, breach of fiduciary obligation, theft, or embezzlement upon an elder or dependent adult, and misconduct in office.

Three-year period (Pen. Code, § 801):

All other felonies, unless otherwise specified by statute. Note: "If the offense is an alternative felony/misdemeanor 'wobbler' initially charged as a felony, the three-year statute of limitations applies, without regard to the ultimate reduction to a misdemeanor after the filing of the complaint." (*People v. Mincey* (1992) 2 Cal.4th 408, 453.)

Two-year period (Pen. Code, § 802(b) & (c)):

Misdemeanors committed upon a minor under the age of 14 and misdemeanors under Business and Professions Code section 729.

One-year period (Pen. Code, § 802(a)):

Misdemeanors. Note: "If the initial charge is a felony but the defendant is convicted of a necessarily included misdemeanor, the one-year period for misdemeanors applies." (*People v. Mincey* (1992) 2 Cal.4th 408, 453; Pen. Code, § 805(b); see also 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 371, p. 425.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 799 et seq.; *People v. Stewart* (1976) 16 Cal.3d 133, 140.
Tolling the Statute ▸ Pen. Code, § 803.
Burden of Proof ▸ *People v. Lopez* (1997) 52 Cal.App.4th 233, 250; *People v. Zamora* (1976) 18 Cal.3d 538, 565; *People v. Crosby* (1962) 58 Cal.2d 713, 725.

RELATED ISSUES

Computation of Time
To determine the exact date the statute began to run, exclude the day the crime was completed. (*People v. Zamora* (1976) 18 Cal.3d 538, 560.)

Burden of Proof
At trial, the prosecutor bears the burden of proving by a preponderance of the evidence that the prosecution began within the required time. However, at a pre-trial motion to dismiss, the defendant has the burden of proving that the statute of limitations has run as a matter of law. (*People v. Lopez* (1997) 52 Cal.4th 233, 249–51.) The defendant is entitled to prevail on the motion only if there is no triable issue of fact. (*Id*. at p. 249.)

Offense Completed
When an offense continues over a period of time, the statutory period usually does not begin until after the last overt act or omission occurs. (*People v. Zamora* (1976) 18 Cal.3d 538, 548 [last act of conspiracy to burn insured's property was when fire was ignited and crime completed; last act of grand theft was last insurance payment].)

Waiving the Statute of Limitations
A defendant may affirmatively waive the statute of limitations. (*People v. Cowan* (1996) 14 Cal.4th 367, 371 [defendant allowed to waive statute of limitations but waiver had to be express, informed, and knowing relinquishment of right, and plead guilty to voluntary manslaughter in order to avoid prosecution for the more serious murder charges].) Distinguishing between an express waiver and "waiver in the sense of forfeiture," *Cowan* left open the question of whether the statute of limitations in criminal cases is an affirmative defense, which is forfeited if a defendant fails to raise it before or at trial. (*Id*. at pp. 372–74.)

Felony Murder
Felony-murder charges and felony-murder special circumstances allegations may be filed even though the statute of limitations has run on the underlying felony. (*People v. Morris*

(1988) 46 Cal.3d 1, 14–18, disapproved of on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535.)

Revival of Cause of Action

Penal Code section 803, subdivisions (f)(1) and (g)(1), provides for the revival of causes of action previously barred by statute for specified sex crimes against minors, subject to certain time and reporting conditions. (See *People v. Frazer* (1999) 21 Cal.4th 737, 754–64 [application of § 803(g) not a violation of an ex post facto law].)

690. Insanity: Determination, Effect of Verdict

You have found the defendant guilty of _____ *[insert crime]*. Now you must decide whether (he/she) was legally insane when (he/she) committed the crime(s).

The burden is on the defendant to prove that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime(s).

The defendant was legally insane if:

1. When (he/she) committed the crime(s), (he/she) had a mental disease or defect.

AND

2. As a result, (he/she) did not know or understand the nature and quality of (his/her) act or did not know or understand that (his/her) act was morally or legally wrong.

The following do not qualify as a mental disease or defect for purposes of an insanity defense: personality disorder, adjustment disorder, seizure disorder, and an abnormality of personality or character made apparent only by a series of criminal or antisocial acts.

[Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental defect or disorder which lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity.]

[If the defendant suffered from a settled mental condition caused by the long-term use of drugs or intoxicants, that settled mental condition combined with another mental disease or defect may qualify as legal insanity.]

You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime. If you are satisfied that (he/she) had a mental disease or defect before (he/she) committed the crime, you may conclude that (he/she) suffered from that same condition when (he/she) committed the crime. You must still decide whether that mental disease or defect constitutes legal insanity.

[If you find the defendant was legally insane at the time of (his/her) crime, (he/she) will not be released from custody until a court finds (he/she) qualifies for release under California law. Until that time (he/she) will remain in a mental hospital or outpatient treatment program, if appropriate. (He/She) may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for (his/her) crime[s]. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide if the defendant was legally sane or insane at the time of the crime[s]. You must not speculate as to whether (he/she) is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way.]

If, after consideration of all the evidence, all 12 of you conclude the defendant has proven that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s], you must return a verdict of not guilty by reason of insanity.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on insanity when the defendant has entered a plea of not guilty by reason of insanity. (Pen. Code, § 25.) The court should give the first bracketed paragraph when the sole basis of insanity is the defendant's use of intoxicants. (Pen. Code, § 25.5; *People v. Robinson* (1999) 72 Cal.App.4th 421, 427–28.) If the defendant's use of intoxicants is not the sole basis or causative factor of insanity, but rather one factor among others, the second bracketed paragraph should be given. (*Id*. at p. 430 fn. 5.)

There is no sua sponte duty to inform the jury that an insanity verdict would result in the defendant's commitment to a mental hospital. However, this instruction must be given on request. (*People* v. *Moore* (1985) 166 Cal.App.3d 540, 556; *People* v. *Kelly* (1992) 1 Cal.4th 495, 538.)

AUTHORITY

Instructional Requirements ▸ Pen. Code, §§ 25, 25.5; *People v. Skinner* (1985) 39 Cal.3d 765.
Burden of Proof ▸ Pen. Code, § 25(b).

Excluded Conditions ▸ Pen. Code, § 25.5.
Long-Term Substance Use ▸ *People v. Robinson* (1999) 72 Cal.App.4th 421, 427.
Anti-social Acts ▸ *People v. Fields* (1983) 35 Cal.3d 329, 368-72; *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271.
Commitment to Hospital ▸ Pen. Code, §§ 1026, 1026.5; *People* v. *Moore* (1985) 166 Cal.App.3d 540, 556; *People* v. *Kelly* (1992) 1 Cal.4th 495, 538.

RELATED ISSUES

Bifurcated Proceedings
The defendant has a right to bifurcated proceedings on the questions of sanity and guilt. (Pen. Code, § 1026.) When the defendant enters *both* a "not guilty" and a "not guilty by reason of insanity" plea, the defendant must be tried first with respect to guilt. If the defendant is found guilty, he or she is then tried with respect to sanity. The defendant may waive bifurcation and have both guilt and sanity tried at the same time. (Pen. Code, § 1026(a).)

Temporary Insanity
The defendant's insanity does not need to be permanent in order to establish a defense. The relevant inquiry is the defendant's mental state at the time the offense was committed. (*People v. Kelly* (1973) 10 Cal.3d 565, 577.)

Wrong – Moral and Legal
The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane. (See *People v. Skinner* (1985) 39 Cal.3d 765, 777–84; see also *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271–74.)

Extension of Commitment
The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490.) The test for insanity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765.) In contrast, the standard for recommitment under Penal Code section 1026.5, subdivision (b), is whether a defendant, "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–90; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99.)

Series 700 – Homicide

Homicide and Justification
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Task Force Comments on this Series

Because homicide is a complex area of law, the task force decided on two innovations to help the jury understand the legal principles they must apply when multiple theories or crimes are at issue. First, an introductory instruction, called "General Principles," has been provided which explains what homicide is, what defenses are available, and what different types and degrees of crimes exist within homicide. The task force believes that providing the jurors with this overview will help them understand the relationships between the specific, more nuanced instructions that follow.

Second, the task force organized the instructions to reflect the order the jury would decide the issues in a case and provided "linking" instructions where necessary to connect the instructions. After the "General Principles" instruction, and as appropriate to the case, the defenses of excuse or justification are explained to the jury. The task force felt that defenses should come next because the jury would first decide whether the defendant should be exonerated before addressing culpability for specific crimes. A second advantage to instructing on defenses first is that the jury is educated on these concepts before discussing them in their "imperfect" forms as mitigating factors supporting convictions for lesser offenses. After defenses, the appropriate crimes and degrees of crimes are explained, beginning with first degree murder and proceeding through involuntary manslaughter. If more than one theory for a charge is relied on, an instruction explaining the differences between the theories has been provided. (See instruction 730, Malice versus Felony Murder.) "Link" or "comparative" instructions will also be provided explaining the differences between degrees and types of homicide crimes.

700. Homicide: General Principles

The defendant is charged with murder. Before I continue, I want to explain some general principles about the law of homicide.

Homicide is the killing of a human being by another. A killing is either lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter. You must decide whether the defendant killed unlawfully and, if so, the specific crime[s] (he/she) committed.

I will now instruct you in more detail on what is a legally permissible excuse or justification. I will also instruct you on the different types of murder [and manslaughter] that are in question in this case and explain the differences between the crimes and degrees.

BENCH NOTES

Instructional Duty
This instruction should be given if there are multiple theories of homicide or evidence supporting justification or excuse, as a way of introducing the jury to the law of homicide.

AUTHORITY

Homicide Defined ▸ *People v. Antick* (1975) 15 Cal.3d 79, 87.
Justification or Excuse ▸ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–55.

COMMENTARY

The committee decided that a short introduction on the law of homicide was worthwhile in order to educate the jury at the outset on basic principles governing a complicated body of law. By giving the jury a simple framework, this instruction will help the jurors understand the rest of the instructions. Although “homicide” is a classic legal term, the committee decided to use the word because it appears to now be a part of lay vocabulary and therefore easily recognizable by jurors.

701. Justifiable Homicide: Self-defense or Defense of Another

The defendant is not guilty of (murder/[or] manslaughter) if (he/she) was justified in killing the other person in (self-defense/defense of another). The defendant acted in lawful (self-defense/defense of another) if:

1. The defendant believed that (he/she/_____ *[insert name of third party]*) was (being threatened with death or great bodily injury/resisting the commission of _____ *[insert forcible and atrocious crime]*).

2. (He/She) believed the threatened harm was immediate.

3. (He/She) believed that the use of deadly force was necessary to defend against the threat.

AND

4. The defendant's beliefs were reasonable.

Fear of future harm, no matter how great or how likely the harm, is not sufficient. The defendant's fear must be of (immediate danger to life or of great bodily injury/ immediate danger of the commission of a forcible and atrocious crime.)

The circumstances must be sufficient to make a reasonable person fearful, and the defendant must have acted only under the influence of such fears.

When deciding whether the defendant's belief in the need for defense was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what would appear necessary to a reasonable person in a similar situation with similar knowledge. In other words, consider what a reasonable person would have done who was in the same position as the defendant.

[The defendant's belief that (he/she was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that information.]

[If the deceased threatened or harmed the defendant in the past, the defendant would be justified in acting more quickly or taking stronger self-defense measures than if there had been no earlier threats or harm.]
[If the defendant knew that the deceased had threatened or assaulted others in the past, the defendant would be justified in acting more quickly or taking stronger self-defense measures than if (he/she) did not know of such earlier conduct.]

[If the defendant received threats from a third party that (he/she) reasonably associated with the victim, you may consider those threats in deciding whether the defendant was justified in acting in self-defense. Such threats alone do not establish self-defense. There must also be evidence that the defendant feared immediate harm.]

The prosecutor must prove beyond a reasonable doubt that the defendant was not justified in killing the other person in (self-defense/defense of another). If you have a reasonable doubt that the killing was in (self-defense/defense of another), you must find the defendant not guilty [of] [murder] [and] [manslaughter].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Breverman* (1998) 19 Cal.4th 142, 156 [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*Breverman, supra,* 19 Cal.4th at p. 156.) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–15.) The court must also give the instruction when the defendant simply asks for it, even if it was unsolicited by the court. (*Id.* at p. 615.)

Forcible and Atrocious Crimes

If the defendant's theory of self-defense was that he or she was resisting the commission of murder, mayhem, rape, or robbery, the court should insert the relevant crime in the blank provided in the first requirement, and instruct using the "forcible and atrocious crime" alternative. (See *People v. Ceballos* (1974) 12 Cal.3d 470, 478–79.) In all other cases, the court should instruct using the "death or great bodily injury" alternative. (See Commentary section below.)

Related Instructions
Instruction ___, Justifiable Homicide: Defense of Habitation
Instruction ___, Justifiable Homicide: Peace Officers
Instruction ___, Justifiable Homicide: Preserving the Peace
Instruction 735, Voluntary Manslaughter: Imperfect Self-Defense

AUTHORITY

Justifiable Homicide ▸ Pen. Code, §§ 197–199.
Lawful Resistance ▸ Pen. Code, §§ 692, 693, 694.
Elements ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.
Imminence ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187.
Fear ▸ Pen. Code, § 198.
Reasonable Belief ▸ *Humphrey, supra,* 13 Cal.4th at p. 1082; *People v. Clark* (1982) 130 Cal.App.3d 371, 377.
Burden of Proof ▸ *People v. Banks* (1976) 67 Cal.App.3d 379, 383–84.

COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197(1).) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–79, the court held that although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be "some atrocious crime attempted to be committed by force." (*Id.* at p. 478.) This instruction is therefore designed to be given when self-defense is used in response to threats of great bodily injury or death or when self-defense is used to resist the commission of forcible and atrocious crimes.

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*Ceballos, supra,* 12 Cal.3d at p. 479.) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) If the defendant is asserting that he or she was resisting the commission of one of these specific felonies, the court should instruct using the "forcible and atrocious crime" alternative. In all other cases, the court should instruct using the "death or great bodily injury" alternative. Because the "death or great bodily injury" alternative encompasses the general definition of forcible and atrocious crimes the committee believed that all other felonies and crimes would fall under this alternative and that it was redundant to give a specific definition of forcible and atrocious crimes in the instruction.

RELATED ISSUES

Imperfect Self-defense

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86; *People v. DeLeon* (1997) 10 Cal.App.4th 815, 824.) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not necessary when defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [in rape prosecution, no mistake-of-fact instruction was required where two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

No Duty to Retreat From Attack

A person who is attacked is not required to retreat, but may stand his or her ground and defend against the attack, even though he or she might have gained safety through flight. (*People v. Hughes* (1951) 107 Cal.App.2d 487, 493.) There is no sua sponte duty to instruct on this principle, although such an instruction must be given upon request if sufficient evidence warrants it. (*People v. Hatchett* (1942) 56 Cal.App.2d 20, 22; see instruction __, No Duty to Retreat from Attack.)

No Defense for Initial Aggressor

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197(3); *People v. Trevino* (1988) 200 Cal.App.3d 874, 879; see instruction __, Initial Aggressor.)

Transferred Intent Applies

"[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander." (*People v. Matthews* (1979) 91 Cal.App.3d 1018, 1024; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357.) There is no sua sponte duty to instruct on this principle, although such an instruction must be given upon request when substantial evidence supports it. (*Matthews, supra,* 91 Cal.App.3d at p. 1025; see instruction __, Transferred Intent.)

720. Murder With Malice Aforethought

The defendant is charged [in Count __] with (first degree/second degree) murder. You may find the defendant guilty of murder only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant caused the death of another person [or fetus].

[AND]

2. (He/She) caused the death by an act committed with malice aforethought.

[AND

3. The killing was committed without excuse or justification.]

The defendant acted with malice aforethought if either:

A. (He/She) intended to kill [that is, acted with express malice].

OR

B. (He/She) intentionally did an act that (he/she) knew was highly dangerous to human life and acted with conscious disregard of that danger [that is, acted with implied malice].

Malice aforethought does not require hatred or ill will toward the victim.

[The defendant caused the death of another person if the death was the direct, natural, and probable consequence of the defendant's actions.] [Legally, there may be more than one cause of death. You may not find the defendant guilty unless (his/her) act was a substantial factor in causing the death.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–56.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–91.) If the evidence indicates that

there was only one cause of death, the court should give the "direct, natural, and probable" language in the first sentence of the bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the "substantial factor" definition in the second sentence. (*See People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 747.)

Related Instructions
If the defendant is charged with first degree murder, give this instruction and instruction 721, Murder: Degrees. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first or second degree felony murder, instruct on those crimes and give instruction 730, Malice Versus Felony Murder.

If there is an issue regarding a superseding or intervening cause, give any one of the following instructions on causation, depending upon the facts:

Instruction __, Contributory Negligence.
Instruction __, Improper Medical Treatment.
Instruction __, Victim's Preexisting Condition.

AUTHORITY

Elements ▸ Pen. Code, § 187.
Malice ▸ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–22; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–15.
Causation ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–21.
Ill-will Not Required for Malice ▸ *People v. Sedeno* (1974) 10 Cal.3d 703, 722, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.

COMMENTARY

The committee decided that the distinction between express and implied malice is not necessary in most cases but has included the language in brackets, to be given at the court's discretion. Penal Code section 22, which addresses admissibility of voluntary intoxication evidence, does rely on the distinction between express and implied malice. Section 22 only permits such evidence to be considered on the question whether defendant formed express, as opposed to implied, malice required for murder. In such a case, the court may wish to use the terms express and implied.

LESSER INCLUDED OFFENSES

Voluntary Manslaughter ▸ Pen. Code, § 192(a).
Involuntary Manslaughter ▸ Pen. Code, § 192(b).
Vehicular Manslaughter ▸ Pen. Code, § 192(c).
Gross Vehicular Manslaughter While Intoxicated ▸ Pen. Code, § 191.5.
Attempted Murder ▸ Pen. Code, §§ 663, 189.

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autrey* (1995) 37 Cal.App.4th 351, 362–63; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [refusing defense-requested instruction on foreseeability in favor of standard pattern causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [suggesting the following language be used in a causation instruction: "[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant's act"].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [error to instruct a jury that when deciding causation it "[w]as immaterial that the defendant could not reasonably have foreseen the harmful result].)

721. Murder: Degrees

Murder is divided into two degrees: first and second. If you conclude the defendant committed a murder, you must decide the degree. You may find the defendant guilty of first degree murder only if the prosecutor has proven beyond a reasonable doubt that:

[*A. Premeditation and Deliberation*

The defendant premeditated and deliberated before committing the murder. The defendant premeditated and deliberated if he or she carefully weighed the considerations for and against his or her choice to kill before acting and, knowing the consequences, decided to kill.

The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful thought and weighing of the consequences is not premeditated and deliberated. On the other hand, a cold, calculated decision to kill can be arrived at quickly. What is important is the extent of the reflection.]

[*B. Torture*

The defendant murdered the victim by torture. The defendant murdered by torture if:

1. (He/She) deliberately and with premeditation intended to inflict extreme and prolonged pain on the victim.

AND

2. (He/She) intended to inflict such pain on the victim for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason.]

[*C. Lying in Wait*

The defendant murdered the victim by means of lying in wait. The defendant lay in wait if:

1. (He/She) concealed (his/her) purpose from the victim.
2. (He/She) waited and watched for an opportunity to act.
3. (He/She) then made a surprise attack on the victim from a position of advantage.

AND

4. (He/She) intended to take the victim by surprise to commit the act[s] that resulted in the murder.

[A person may conceal his or her purpose even though the victim is aware of the person's presence. [The concealment may be accomplished by ambush or some other secret design.]]

[*D. Destructive Device*

The defendant murdered the victim using a destructive device or explosive.

[An explosive is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An explosive is also any substance whose main purpose is to be combined with other substances to form a substance that is capable of a relatively instantaneous or rapid release of gas and heat.]

[A _____ *[insert type of destructive device from Pen. Code, § 12301]* **is a destructive device.]**

[A _____ *[insert type of explosive from Health & Saf. Code, § 12000]* **is an explosive.]]**

[*E. Penetrating Ammunition*

The defendant murdered the victim by knowing use of ammunition designed primarily to penetrate metal or armor.]

[*F. Discharge From Vehicle*

The defendant murdered the victim by firing a weapon from a vehicle in that:

1. **The defendant fired a weapon from a vehicle.**
2. **(He/She) intentionally fired at another person outside the vehicle.**
   AND
3. **(He/She) intended to kill.]**

[*G. Poison*

The defendant murdered the victim using poison.

[Poison is a substance, applied externally or taken internally, that kills by its own inherent qualities.]]

All other murders are in the second degree.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give instruction 720, Murder with Malice Aforethought. Depending upon the theory of first degree murder relied upon by the prosecutor, instruct using the appropriate alternative A through G.

AUTHORITY

Types of Statutory First Degree Murder ‣ Pen. Code, § 189.
Premeditation and Deliberation Defined ‣ *People v. Anderson* (1970) 70 Cal.2d 15, 26–27; *People v. Bender* (1945) 27 Cal.2d 164, 183–84; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–02.
Torture Requirements ‣ *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101, habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004; *People v. Wiley* (1976) 18 Cal.3d 162, 168–72.
Lying in Wait Requirements ‣ *People v. Stanley* (1995) 10 Cal.4th 764, 794; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139; *People v. Webster* (1991) 54 Cal.3d 411, 448*; People v. Laws* (1993) 12 Cal.App.4th 786, 794–95.
Destructive Device Defined ‣ Pen. Code, § 12301.
Explosive Defined ‣ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604.
Poison Defined ‣ *People v. Van Deleer* (1878) 53 Cal. 147, 149.

LESSER INCLUDED OFFENSES

Murder ‣ Pen. Code, § 187.
Voluntary Manslaughter ‣ Pen. Code, § 192(a).
Involuntary Manslaughter ‣ Pen. Code, § 192(b).
Vehicular Manslaughter ‣ Pen. Code, § 192(c).
Gross Vehicular Manslaughter While Intoxicated ‣ Pen. Code, § 191.5.
Attempted First Degree Murder ‣ Pen. Code, §§ 663, 189.
Attempted Murder ‣ Pen. Code, §§ 663, 187.

RELATED ISSUES

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving

Penal Code section 189 does not require the vehicle to be moving in order to constitute a drive-by shooting. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

Premeditation and Deliberation—Anderson *Factors*

Evidence in any combination from the following categories suggests premeditation and deliberation: (1) events prior to the murder that indicate planning, (2) motive, specifically evidence of a relationship between the victim and the defendant, and (3) method of the killing that is particular and exacting and evinces a preconceived design to kill. (*People v. Anderson* (1970) 70 Cal.2d 15, 26–27.) Although these categories have been relied on to decide whether premeditation and deliberation are present, an instruction that suggests that each of these factors *must* be found in order to find deliberation and premeditation is not proper. (*People v. Lucero* (1988) 44 Cal.3d 1006.) *Anderson* also noted that the brutality of the killing alone is not sufficient to support a finding that the killer acted with premeditation and deliberation. For example, the infliction of multiple acts of violence on the victim without any other evidence indicating premeditation will not support a first degree murder conviction. (*Anderson, supra,* 70 Cal.2d at pp. 24–25.)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [provocation raised reasonable doubt about the idea of premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"].) There is, however, no sua sponte duty to instruct the jury on this issue because provocation in this context is a defense to the element of deliberation, not an element of the crime, as it is in the manslaughter context. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 33.)

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim's death. "The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation]." (*People v. Proctor* (1993) 4 Cal.4th 499, 530–31.)

Torture—Instruction on Voluntary Intoxication

"A court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242.)

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffered pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239.)

Torture–Premeditated Intent to Inflict Pain
Although the court did not address an instructional duty on this point, in its analysis of the sufficiency of the evidence of intent to inflict extreme pain, the court applied the guidelines established in *People v. Anderson* (1970) 70 Cal.2d 15, 26–27 to determine premeditation and deliberation. (*People v. Mincey* (1992) 2 Cal.4th 408, 434–36.)

Lying in Wait–Length of Time Equivalent to Premeditation and Deliberation
In *People v. Stanley* (1995) 10 Cal.4th 764, 794, the court approved this instruction regarding the length of time a person lies in wait: "[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."

725. Felony Murder: First Degree

The defendant is charged [in Count __] with first degree murder, and the prosecutor argues that he is guilty under a theory of felony murder.

You may find the defendant guilty of first degree felony murder only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant committed [or attempted to commit] _____ *[insert felony from Pen. Code, § 189, except Mayhem]***.**

AND

2. During the commission [or attempted commission] of _____ *[insert felony]*, **another person was (killed/fatally injured).**

The defendant committed [or attempted to commit] _____ *[insert felony]* **if:**

[Insert the numbered elements of the underlying felony or attempted felony]

A person may be guilty of felony murder even if the killing was accidental or negligent.

[The defendant must have intended to commit the felony before or at the time of the killing.]

[A killing occurs during the commission or attempted commission of a felony when the fatal injury is inflicted during the felony, even if the victim does not die immediately.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying felony. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

If the underlying felony is mayhem, give instruction 726, Murder by Mayhem. If the victim is fatally injured and dies at a later time, instruct with “fatally injured” instead of “killed” in the second element.

The other felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, train wrecking, sodomy, lewd and lascivious acts on a child, oral copulation, and penetration by foreign object. (See Pen. Code, § 189.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–27.)

A person is not guilty of felony murder for killings committed during the felony by a person other than the defendant or his or her accomplice. (*People v. Washington* (1965) 62 Cal.2d 777, 782–83; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine. (See instruction __, Provocative Act Doctrine.)

Related Instructions
If aiding and abetting is relied on, the court should give instruction ___, Felony Murder: Aiding and Abetting. (See *People v. Pulido* (1997) 15 Cal.4th 713; *People v. Esquivel* (1994) 28 Cal.App.4th 1386; *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1656.)

If the prosecutor is proceeding under both malice and felony murder theories, the court should also give instruction 730, Malice versus Felony Murder. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [rape case].) This issue typically arises in burglary and robbery cases where there is a question about when those crimes end for purposes of liability for felony murder. (See instruction ___, Burglary: Complete for Felony Murder or instruction ___, Robbery: Complete for Felony Murder; see also *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299 [duty to give instruction regarding when kidnapping ends].) For a general discussion of the issue, see *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–11 [robbery case]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [sodomy and rape case]; *People v. Thompson* (1990) 50 Cal.3d 134, 171–72 [case involving lewd and lascivious acts with a child]; *People v. Atkins* (1982) 128 Cal.App.3d 564, 568 [comparing special circumstances case].)

AUTHORITY

Enumerated Felonies ▸ Pen. Code, § 189.
Intent ▸ *People v. Sears* (1965) 62 Cal.2d 737, 745, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509 fn. 17; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396.
Continuous Transaction Requirement ▸ *People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.
Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–23.

LESSER INCLUDED OFFENSES

Second Degree Murder ▸ Pen. Code, § 187.
Voluntary Manslaughter ▸ Pen. Code, § 192(a).
Involuntary Manslaughter ▸ Pen. Code, § 192(b).
Attempted Murder ▸ Pen. Code, §§ 663, 189.
Underlying Felony and Attempted Underlying Felony

RELATED ISSUES

Auto Burglary
Auto burglary may form the basis for a first degree felony murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–23, 628 [noting the problems of applying the felony murder rule to a nondangerous daytime auto burglary].)

Decedent Does Not Need to Be a Victim of the Underlying Felony
The felony murder rule does not require that the person killed be the victim of the underlying felony. The doctrine applies if the person killed is an accomplice (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658), an innocent bystander (*People v. Welch* (1972) 8 Cal.3d 106, 117–19), or a police officer arriving on the scene (*People v. Salas* (1972) 7 Cal.3d 812, 823).

Heart Attack
Felony murder has been upheld where the victim died of a heart attack either during or after the perpetration of the felony. (*People v. Stamp* (1969) 2 Cal.App.3d 203, 209–11 [after]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [during].)

Imperfect Self-Defense
Imperfect self-defense is not a defense to felony murder because malice aforethought, which it negates, is not an element of felony murder. (*People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9.)

Merger: Ireland Rule

In *People v. Ireland* the court held that assault could not form the basis of a charge for second degree felony murder because the assaultive conduct "merges" with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–40 [merger based on assault with a deadly weapon].) Although merger is typically an issue in second degree felony murder, in *People v. Garrison* (1989) 47 Cal.3d 746, 778, the court held that first degree felony murder cannot be based on a burglary where the intent on entry is to commit an assault. (For further discussion see the related issues section under instruction 727, Felony Murder: Second Degree.)

726. Murder by Mayhem

The defendant is charged [in Count __] with first degree murder, and the prosecutor argues that he is guilty under a theory of felony murder.

You may find the defendant guilty of first degree felony murder only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant committed [or attempted to commit] mayhem.

2. The defendant intended to commit mayhem.

AND

3. During the commission [or attempted commission] of mayhem, another person was (killed/fatally injured).

The defendant committed [or attempted to commit] mayhem if (he/she) did any one of the following:

A. Unlawfully and maliciously removed a part of another person's body;

B. Disabled, disfigured or made useless another person's body part;

OR

C. Cut or disabled the tongue, put out an eye, or slit the nose, ear, or lip of another person.

A person may be guilty of felony murder even if the killing was accidental or negligent.

[The defendant must have intended to commit mayhem before or at the time of the killing.]

[A killing occurs during the commission [or attempted commission] of mayhem when the fatal injury is inflicted during the mayhem, even if the victim does not die immediately.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of mayhem. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) If the victim is fatally injured and dies at a later time, instruct with "fatally injured" instead of "killed" in element 3.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–27)

A person is not guilty of felony murder for killings committed during the felony by a person other than the defendant or his or her accomplice. (*People v. Washington* (1965) 62 Cal.2d 777, 782–83; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine. (See instruction __, Provocative Act Doctrine.)

Related Instructions

If aiding and abetting is relied on, the court should give instruction ___, Felony Murder: Aiding and Abetting. (See *People v. Pulido* (1997) 15 Cal.4th 713; *People v. Esquivel* (1994) 28 Cal.App.4th 1386; *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1656.)

If the prosecutor is proceeding under both malice and felony murder theories, the court should also give instruction 730, Malice versus Felony Murder. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [rape case].) This issue typically arises in burglary and robbery cases where there is a question about when those crimes end for purposes of liability for felony murder. (See instruction ___, Burglary: Complete for Felony Murder, or instruction ___, Robbery: Complete for Felony Murder; see also *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299 [duty to give instruction regarding when kidnapping ends].) For a general discussion of the issue, see *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–11 [robbery case]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [sodomy and rape case]; *People v. Thompson* (1990) 50 Cal.3d 134, 171–72 [case involving lewd and lascivious acts with a child]; *People v. Atkins* (1982) 128 Cal.App.3d 564, 568 [comparing special circumstances case].)

AUTHORITY

Enumerated Felonies ▸ Pen. Code, § 189.
Intent ▸ *People v. Sears* (1965) 62 Cal.2d 737, 745, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396.
Continuous Transaction Requirement ▸ *People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.
Infliction of Fatal Injury ▸ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–23.

LESSER INCLUDED OFFENSES

Second Degree Murder ▸ Pen. Code, § 187.
Voluntary Manslaughter ▸ Pen. Code, § 192(a).
Involuntary Manslaughter ▸ Pen. Code, § 192(b).
Attempted Murder ▸ Pen. Code, §§ 663, 189.
Underlying Felony and Attempted Underlying Felony

COMMENTARY

The committee decided to include a separate instruction on murder by mayhem. Unlike the other felony murders, murder by mayhem requires the additional element of intent to commit mayhem.

RELATED ISSUES

See generally, the related issues section under instruction 725, Felony Murder: First Degree.

727. Felony Murder: Second Degree

The defendant is charged [in Count __] with second degree murder, and the prosecutor argues that (he/she) is guilty under a theory of felony murder.

You may find the defendant guilty of second degree felony murder only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant committed [or attempted to commit] _____ *[insert inherently dangerous felony]*.

AND

2. During the commission [or attempted commission] of the _____ *[insert felony]*, another person was (killed/fatally injured).

The defendant committed [or attempted to commit] _____ *[insert felony]* if:

[Insert the numbered elements of the underlying felony or attempted felony]

A person may be guilty of felony murder even if the killing was accidental or negligent.

[The defendant must have intended to commit the felony before or at the time of the killing.]

[A killing occurs during the commission or attempted commission of a felony when the fatal injury is inflicted during the felony, even if the victim does not die immediately.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying felony. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) If the victim is fatally injured and dies at a later time, instruct with "fatally injured" instead of "killed" in element 2.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–27.)

A person is not guilty of felony murder for killings committed during the felony by a person other than the defendant or his or her accomplice. (*People v. Washington* (1965) 62 Cal.2d 777, 782–83; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine. (See instruction __, Provocative Act Doctrine.)

Related Instructions
If aiding and abetting is relied on give instruction __, Felony Murder: Aiding and Abetting. (See *People v. Pulido* (1997) 15 Cal.4th 713; *People v. Esquivel* (1994) 28 Cal.App.4th 1386; *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1656.)

If the prosecutor is proceeding under both malice and felony murder theories, the court should also give instruction 730, Malice versus Felony Murder. No instruction on malice should be given if the prosecutor is relying only on a felony murder theory. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when only felony murder charged].)

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [discussing requirement in context of rape].) This issue typically arises in burglary and robbery cases where there is a question about when those crimes end for purposes of liability for felony murder. (See instruction __, Burglary: Complete for Felony Murder or instruction __, Robbery: Complete for Felony Murder; see also *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299 [duty to instruct on when kidnapping ends].) For a general discussion of the issue, see *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–11 [robbery case]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348 [sodomy and rape case]; *People v. Thompson* (1990) 50 Cal.3d 134, 171–72 [case involving lewd and lascivious acts with a child]; *People v. Atkins* (1982) 128 Cal.App.3d 564, 568 [comparing special circumstances case].)

AUTHORITY

Inherently Dangerous Felonies ▸ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th, 470; *People v. Henderson* (1977) 19 Cal.3d 86, 93, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th, 470; *People v. Patterson* (1989) 49 Cal.3d 615, 622–25.

Intent ‣ *People v. Sears* (1965) 62 Cal.2d 737, 745, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396.
Continuous Transaction Requirement ‣ *People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.
Infliction of Fatal Injury ‣ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–23.

LESSER INCLUDED OFFENSES

Voluntary Manslaughter ‣ Pen. Code, § 192(a).
Involuntary Manslaughter ‣ Pen. Code, § 192(b).
Attempted Murder ‣ Pen. Code, §§ 663, 189.
Underlying Felony and Attempted Underlying Felony

RELATED ISSUES

See generally, the related issues section under instruction 725, Felony Murder: First Degree.

Merger – Ireland Rule
Assault or assault with a deadly weapon cannot form the basis for a charge of second degree felony murder because the assaultive conduct "merges" with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–40 [merger based on assault with a deadly weapon]; see also *People v. Garrison* (1989) 47 Cal.3d 746, 778 [first degree felony murder cannot be based on burglary where intent on entry is to commit assault].) Because most homicides result from assaultive conduct, permitting prosecution under the felony murder rule would automatically elevate most homicides to murder. (*Ireland*, *supra*, 70 Cal.2d at pp. 539–40.) The Supreme Court has rejected specific tests designed to determine whether a felony falls within the doctrine and instead has applied a policy analysis in deciding the issue. (*People v. Hansen* (1994) 9 Cal.4th 300, 311–15 [court looks at effect of including felony within the doctrine and whether permitting inclusion would frustrate legislative intent behind felony murder].)

Second Degree Felony Murder – Inherently Dangerous Felonies: Analysis
The second degree felony murder doctrine is triggered when a homicide occurs during the commission of a felony that is inherently dangerous to human life. (*People v. Satchell* (1971) 6 Cal.3d 28, 33–41 and *People v. Henderson* (1977) 19 Cal.3d 86, 93, both overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470.) In *People v. Burroughs* (1984) 35 Cal.3d 824, 833, the court described an inherently dangerous felony as one that cannot be committed without creating a substantial risk that someone will be killed. However, in *People v. Patterson* (1989) 49 Cal.3d 615, 618, 626–27, the court defined an inherently

dangerous felony as "an offense carrying a high probability that death will result." (See *People v. Coleman* (1992) 5 Cal.App.4th 646, 649–50 [court explicitly adopts *Patterson* definition of inherently dangerous felony].)

When deciding whether a felony is inherently dangerous, the court should assess "the elements of the felony in the abstract, not the particular facts of the case," and consider the statutory definition of the felony in its entirety. (*Satchell, supra,* 6 Cal.3d at p. 36; *Henderson, supra,* 19 Cal.3d at pp. 93–94.) If the statute at issue prohibits a diverse range of conduct, the court must analyze whether the entire statute or only the part relating to the specific conduct at issue is applicable. (See *People v. Patterson* (1989) 49 Cal.3d 615, 622–25 [analyzing Health & Saf. Code, §11352, which prohibits range of drug-related behavior, and holding that only conduct at issue should be considered when determining dangerousness].)

The following felonies have been found inherently dangerous for purposes of second degree felony murder:

Attempted Escape From Prison by Force or Violence ‣ Pen. Code, § 4530; *People v. Lynn* (1971) 16 Cal.App.3d 259, 272; *People v. Snyder* (1989) 208 Cal.App.3d 1141, 1143–46.
Discharging a Firearm From a Vehicle at an Inhabited Dwelling ‣ *People v. Hansen* (1994) 9 Cal.4th 300 (may also be first degree murder if intent to shoot a person is present, see Pen. Code, § 189).
Eluding a Police Officer by Driving in Willful Disregard for Safety ‣ Veh. Code, § 2800.2; *People v. Johnson* (1993) 15 Cal.App.4th 169, 173–74.
Furnishing a Poisonous Substance ‣ Pen. Code, § 347; *People v. Mattison* (1971) 4 Cal.3d 177, 182–84.
Manufacturing Methamphetamine ‣ Health & Saf. Code, § 11379.6(a); *People v. James* (1998) 62 Cal.App.4th 244, 270–71.
Reckless Possession of a Bomb ‣ Pen. Code, § 12303.2; *People v. Morse* (1992) 2 Cal.App.4th 620, 646, 655.
Shooting at an Inhabited Dwelling ‣ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9–10.
Shooting at an Occupied Vehicle ‣ Pen. Code, § 246; *Tabios, supra,* 67 Cal.App.4th at pp. 10–11.

The following felonies have been found to be *not* inherently dangerous for purposes of second degree felony murder:

Conspiracy to Possess Methedrine ‣ *People v. Williams* (1965) 63 Cal.2d 452, 458.

Felon in Possession of a Firearm ▸ Pen. Code, § 12021; *People v. Satchell* (1971) 6 Cal.3d 28, 39–41, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470.

Felony Escape From Prison Without Force or Violence ▸ Pen. Code, § 4530(b); *People v. Lopez* (1971) 6 Cal.3d 45, 51–52.

Grand Theft From the Person ▸ Pen. Code, § 487.2; *People v. Morales* (1975) 49 Cal.App.3d 134, 142–43.

Grand Theft False Pretenses ▸ *People v. Phillips* (1966) 64 Cal.2d 574, overruled on other grounds in *Flood, supra,* 18 Cal.4th 470.

False Imprisonment ▸ Pen. Code, § 236; *People v. Henderson* (1977) 19 Cal.3d 86, 92–96, overruled on other grounds in *Flood, supra,* 18 Cal.4th 470[1].

Felonious Practice of Medicine Without a License ▸ *People v. Burroughs* (1984) 35 Cal.3d 824, 830–33.

Felony Child Abuse ▸ Pen. Code, § 273a; *People v. Lee* (1991) 234 Cal.App.3d 1214, 1228.

Furnishing PCP ▸ Health & Saf. Code, § 11379.5; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1100–01.

Extortion ▸ Pen. Code, §§ 518, 519; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1237–38.

730. Malice Versus Felony Murder

The defendant has been tried for murder under two theories: (1) that the killing was committed with malice aforethought or (2) that a person was killed during the commission of _____ *[insert felony]*.

Each theory of murder has different requirements, and I will instruct you on each.

You may not convict the defendant of murder unless all 12 jurors agree beyond a reasonable doubt that the defendant committed a murder. It is not necessary that all 12 jurors agree on the same theory.

BENCH NOTES

Instructional Duty

This instruction is designed to be given when murder is charged on theories of malice and felony murder to help the jury distinguish between the two theories. It should be given after instruction 701 and before instruction 720.

735. Voluntary Manslaughter: Imperfect Self-defense

An [intentional] killing, that would otherwise be murder, is reduced to voluntary manslaughter if the defendant killed a person because (he/she) believed that (he/she/another person) was in imminent danger of death or great bodily injury, even though the belief was unreasonable. In such a circumstance, (he/she) acts in imperfect self-defense. The defendant acted with imperfect self-defense if:

1. The defendant believed that (he/she/_____ *[insert name of third party]*) was being threatened with death or great bodily injury.

2. The defendant believed the threatened harm was immediate.

3. (He/She) believed that the use of deadly force was necessary to defend against the threat.

AND

4. The defendant's beliefs were unreasonable.

Fear of future harm, no matter how great or how likely the harm, is not sufficient. The defendant's fear must be of immediate danger to life or of great bodily injury.

When deciding whether the defendant was in immediate fear of death or great bodily injury, consider all the circumstances as they were known and appeared to the defendant.

A person who kills [intentionally] with imperfect self-defense is not guilty of murder. To establish murder, the prosecutor must prove beyond a reasonable doubt that the defendant did not act with imperfect self-defense.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or unreasonable self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (*People v. McCoy* (2000) 79 Cal.App.4th 67; *People v. Breverman* (1998) 19 Cal.4th 142, 153–63; *People v. Barton* (1995) 12 Cal.4th 186, 201.)

Related Instructions
Instruction 701, Justifiable Homicide: Self-defense or Defense of Another.

AUTHORITY

Elements ▸ Pen. Code, § 192(a).
Imperfect Self-defense Defined ▸ *People v. McCoy* (2000) 79 Cal.App.4th 67; *People v. Flannel* (1979) 25 Cal.3d 668, 680–83; *People v. Barton* (1995) 12 Cal.4th 186; *In re Christian S.* (1994) 7 Cal.4th 768.

COMMENTARY

The Supreme Court recently granted review to determine the intent requirements needed for voluntary manslaughter. (See *People v. Blakeley* (S062453), previously published at 55 Cal.App.4th 319 [review granted 10/1/97].) Because this issue has yet to be resolved, the committee the decided to leave a bracket around "intentional" in the first sentence of the instruction.

LESSER INCLUDED OFFENSES

Attempted Voluntary Manslaughter ▸ *People v. Von Ronk* (1985) 171 Cal.App.3d 818, 822; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–26.

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784.)

RELATED ISSUES

Imperfect Self-defense – Battered Woman's Syndrome
Evidence relating to battered woman's syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–89, disapproving *People v. Aris* (1989) 215 Cal.App.3d 1178, 1189 [it was error for the court to instruct the jury that evidence of battered woman's syndrome was only relevant to the defendant's actual belief].)

Imperfect Self-defense – Defendant is Initial Aggressor
The initial aggressor or perpetrator of a crime may not invoke the doctrine of self-defense against the victim's legally justified acts. (See *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; see also *People v. Balderas* (1985) 41 Cal.3d 144, 196.)

Imperfect Self-defense – Inapplicable to Felony murder
Imperfect self-defense does not apply to felony murder. "Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of imperfect self-defense, offered to negate malice, is likewise irrelevant." (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6; see also *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1666; *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170.)

Imperfect Self-defense – Threats from Third Parties
The jury may consider evidence of threats against the defendant by third parties if there is evidence that the defendant associated the victim with those threats. (*People* v. *Minifie* (1996) 13 Cal.4th 1055, 1069 [in a self-defense case where the court also applied reasoning to imperfect self-defense].)

Perfect Self-defense
Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86; see also *People v. DeLeon* (1997) 10 Cal.App.4th 815, 824.) The court in *People v. Rodriguez* disagreed however, and found that an imperfect self-defense instruction was not necessary when the defendant's version of the crime "could only lead to an acquittal based on justifiable homicide," and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (See *People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

736. Voluntary Manslaughter: Heat of Passion

An [intentional] killing, that would otherwise be murder, is reduced to voluntary manslaughter if the defendant killed a person because of a sudden quarrel or in the heat of passion.

The defendant killed a person because of a sudden quarrel or in the heat of passion if:

1. The defendant killed rashly and under the influence of strong emotion, and without reason or judgment.

2. (He/She) was provoked to kill by the other person's behavior.

AND

3. The other person's behavior was provocative enough to make an ordinary person of average disposition act rashly and without judgment.

In evaluating the defendant's reaction to the provocation, consider all the circumstances as they were known and appeared to the defendant and consider what an ordinary person in a similar situation with similar knowledge would have done.75

[The defendant must act without reason or judgment. If enough time passed between the provocation and the killing for the defendant to "cool off" and for reason and judgment to return, the defendant did not act in the heat of passion and the killing is not voluntary manslaughter.]

[The other person's provocative behavior may occur over a period of time.]

A person who kills [intentionally] in the heat of passion is not guilty of murder. To establish murder, the prosecutor must prove beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is "substantial enough to merit consideration" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–63; *People v. Barton* (1995) 12 Cal.4th 186, 201.)

The defendant is entitled, on request, to a pinpoint instruction that the victim's provocative acts may occur over a period of time. (*People v. Wharton* (1991) 53 Cal.3d 522, 569–71.) The other bracketed instructions are supported by caselaw and should be given if requested and there is sufficient evidence. No explicit instructional duty, however, has been identified by caselaw. (See generally, Pen. Code, §§ 1093(f), 1127; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 256; *People v. Harvey* (1985) 163 Cal.App.3d 90, 112; *People v. Wright* (1988) 45 Cal.3d 1126, 1137.)

Related Instructions
Instruction 715, Excusable Homicide: Heat of Passion.

AUTHORITY

Elements ▸ Pen. Code, § 192(a).
Heat of Passion Defined ▸ *People v. Breverman* (1998) 19 Cal.4th 142, 163; *People v. Valentine* (1946) 28 Cal.2d 121, 139; *People v. Lee* (1999) 20 Cal.4th 47, 59.

COMMENTARY

Because there is an issue with respect to the intent requirements for voluntary manslaughter, the committee has left a bracket around [intentional] in the first sentence of the instruction. (See *People v. Blakeley* (S062453), previously published at 55 Cal.App.4th 319 [rev. granted 10/1/97].)

LESSER INCLUDED OFFENSES

Attempted Voluntary Manslaughter ▸ *People v. Von Ronk* (1985) 171 Cal.App.3d 818, 822; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–26.

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784.)

RELATED ISSUES

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355.) “While the Legislature has seen fit to include the killing of a fetus, as well as a human being, [within] the definition of murder under Pen. Code, § 187, subd. (a), it has left untouched the provisions of Pen. Code, § 192, defining manslaughter [as] the "unlawful killing of a human being.” (*Id*. at p. 351.)

Heat of Passion: Sufficiency of Provocation – Examples

In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant’s yard and attacked defendant’s car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163–64.) Provocation has also been found sufficient based on: the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694), a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211), and the infidelity of a wife (*People v. Berry* (1976) 18 Cal.3d 509, 515) or lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328–29).

In the following cases, provocation has been found inadequate as a matter of law: evidence of name calling, smirking, or staring and looking stonefaced (*People v. Lucas* (1997) 55 Cal.App.4th 721,739), insulting words or gestures (*People v. Dixon* (1961) 192 Cal.App.2d 88, 91), refusing to have sex in exchange for drugs (*People v. Dixon* (1995) 32 Cal.App.4th 1547, 1555), a victim’s resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112), and the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.) In addition the court has suggested that mere vandalism to an automobile is insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3.)

Heat of Passion: Types of Provocation

Heat of passion does not require anger or rage. It can be “any violent, intense, high-wrought or enthusiastic emotion.” (*People v. Breverman* (1998) 19 Cal.4th 142, 163–64.)

Heat of Passion: Defendant’s Own Standard

Unrestrained and unprovoked rage does not constitute heat of passion, and a person of extremely violent temperament cannot substitute his or her own subjective standard for heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121, 139 [court approved admonishing jury on this point]; *People* v. *Danielly* (1949) 33 Cal.2d 362, 377; *People v. Berry* (1976) 18 Cal.3d 509, 515.)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation and heat of passion may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [provocation raised reasonable doubt about the idea

of premeditation or deliberation, “leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation”].) There is, however, no sua sponte duty to instruct the jury on this issue because provocation in this context is a defense to the element of deliberation, not an element of the crime, as it is in the manslaughter context. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 33.)

Series 800 – Robbery and Carjacking

800. Robbery

The defendant is charged [in Count _____] with robbery.

You may find the defendant guilty of robbery only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant took property that was not (his/her) own.

2. The property was taken from another person's possession and immediate presence.

3. The defendant knowingly used force or fear to take the property or to prevent the person from resisting.

4. The property was taken against the person's will.

AND

5. At the time the defendant used force or fear to take the property, (he/she) intended to deprive the person of it permanently.

[Someone possesses property if he or she owns it, has physical control over it, or has been given responsibility for or authority over it by the owner.]

[Fear, as used here, means fear of (injury to the person, himself or herself/or/ injury to the person's family or property/or/immediate injury to someone else present during the incident or to that person's property).]

[Property is within a person's immediate presence if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime**.** There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [fear]; *People v. Mungia* (1991) 234
Cal.App.3d 1703, 1708 [fear]; but see *1999 CJER Mandatory Criminal Jury Instructions Handbook*, § 2.66, p. 55 [recommending that a definition of possession be given].)

Related Instructions
If the defendant is charged with first degree robbery, give instruction 805, Robbery: Degrees. If defendant is charged with second degree robbery, no other instruction is required.

AUTHORITY

Elements ▸ Pen. Code, § 211.
Intent Requirements for Robbery ▸ *People v. Green* (1980) 27 Cal.3d 1, 52–53, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.
Possession Defined ▸ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461.
Fear Defined ▸ Pen. Code, § 212.
Immediate Presence Defined ▸ *People v. Hayes* (1991) 52 Cal.3d 577, 626–27.

COMMENTARY

The instruction includes definitions of "possession," "fear," and "immediate presence" because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52.)

Possession was defined in the instruction because either actual or constructive possession of property will satisfy this element, and this definition may not be readily apparent to jurors. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [defining possession].) However, in *People v. Nguyen* (1998) 67 Cal.App.4th 1241, review granted Feb. 24, 1999, the Court of Appeal held that no possessory interest in the property is necessary to sustain a robbery conviction and approved an instruction to that effect given by the trial court.

Fear was defined in the instruction because the statutory definition includes fear of injury to third parties, and this concept is not encompassed within the common understanding of fear. Force was not defined because its definition in the context of robbery is commonly

understood. (See *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 ["force is a factual question to be determined by the jury using its own common sense"].)

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim's ability to control the property. This definition may not be readily apparent to jurors.

LESSER INCLUDED OFFENSES

Attempted Robbery ▸ Pen. Code, §§ 663, 211; *People v. Webster* (1991) 54 Cal.3d 411, 443.
Grand Theft ▸ Pen. Code, §§ 484–487h; *People v. Webster, supra,* at p. 443.
Grand Theft Vehicle ▸ Pen. Code, § 487h(a); *People v. Gamble* (1994) 22 Cal.App.4th 446, 450; *People v. Escobar* (1996) 45 Cal.App.4th 477, 482.
Petty Theft ▸ Pen. Code, §§ 484–488; *People v. Covington* (1934) 1 Cal.2d 316, 320.

When there is evidence that the defendant formed the intent to steal *after* the application of force or fear, the court has a **sua sponte** duty to instruct on any relevant lesser included offenses. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055–57 [error not to instruct on lesser included offense of theft]); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–52 [same].)

RELATED ISSUES

After-Formed Intent
A person must have formed the intent to steal before or when he or she used force to take the property. (*People v. Green* (1980) 27 Cal.3d 1, 52; *People v. Turner* (1990) 50 Cal.3d 668, 691; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *Rodriguez v. Santa Clara Superior Court* (1984) 159 Cal.App.3d 821, 825-26.)

Asportation
To constitute a taking, the property need only be moved a small distance. It does not have to be under the robber's actual physical control. If a person acting under the robber's direction, including the victim, moves the property, the element of taking is satisfied. (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174; *People v. Price* (1972) 25 Cal.App.3d 576, 578.)

Claim of Right
If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to robbery. (*People v. Butler* (1967) 65 Cal.2d 569, 573; *People v. Romo* (1990) 220 Cal.App.3d 514, 518 [discussing defense in

context of theft]; see instruction __, Claim of Right.) This defense is only available for robberies where a specific piece of property is reclaimed; it is not a defense to robberies perpetrated to settle a debt, liquidated or unliquidated. (*People v. Tunfunga* (1999) 21 Cal.4th 935, 945–50.)

Fear
A victim's fear may be shown by circumstantial evidence. (*People v. Davison* (1995) 32 Cal.App.4th 206, 212.) Even when the victim testifies that he or she is not afraid, circumstantial evidence may satisfy the element of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 498–99.)

Force
The force required for robbery must be more than the incidental touching necessary to take the property. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 [noting that the force employed by a pickpocket would be insufficient].)

The application of force or fear may be used when taking the property or when carrying it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8; *People v. Pham* (1993) 15 Cal.App.4th 61, 65–67; *People v. Estes* (1983) 147 Cal.App.3d 23, 27–28.)

Administering an intoxicating substance or poison to the victim in order to take property constitutes force. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 628–29; but see *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1371–72 [no force where victim became voluntarily intoxicated]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 209–10 [explaining force for purposes of robbery and contrasting it with force required for assault].)

Immediate Presence
Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415; see also *People v. Prieto* (1993) 15 Cal.App.4th 210, 214 [reviewing cases where victim is a distance away from property taken].) Property has also been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–42) or when the victim abandons the property out of fear (*People v. Dominquez* (1992) 11 Cal.App.4th 1342, 1348–49.)

Multiple Victims
Multiple counts of robbery are permissible when there are multiple victims even if only one taking occurred. (*People v. Ramos* (1982) 30 Cal.3d 553, 589, reversed on other grounds *California v. Ramos* (1983) 463 U.S. 992; *People v. Miles* (1996) 43 Cal.App.4th 364 [multiple punishment permitted].) Conversely, a defendant commits

only one robbery, no matter how many items are taken from a single victim pursuant to a single plan. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325–26, fn. 8.)

Value

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–35.) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57.)

805. Robbery: Degrees

Robbery is divided into two degrees. If you conclude the defendant committed a robbery, you must then decide the degree.

You may find the defendant guilty of first degree robbery only if the prosecutor has proven beyond a reasonable doubt that:

[The robbery was committed in an inhabited (dwelling/vessel/floating home/trailer coach/part of a building). A (house/vessel/floating home/trailer coach/ part of a building) is inhabited if someone lives there and is present or has left temporarily and plans to return.]

[The robbery was committed while the person robbed was using or had just used an ATM machine and was still near the machine.]

[The robbery was committed while the person robbed was performing (his/her) duties as the driver of or was a passenger on a (bus/taxi/cable car/streetcar/trackless trolley/any vehicle used to transport people for hire.)]

All other robberies are second degree.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction if first degree robbery has been charged.

AUTHORITY

Determination of Degrees ▸ Pen. Code, § 212.5.
Inhabitation ▸ *People v. Jackson* (1992) 6 Cal.App.4th 1185, 1188.
Vessel Defined ▸ Harb. & Nav. Code, § 21.
Floating Home Defined ▸ Health & Saf. Code, § 18075.55(d).
Trailer Coach Defined ▸ Veh. Code, § 635; Health & Saf. Code, § 18010(b).

RELATED ISSUES

Hotel Room
A hotel room is an "inhabited dwelling house" for purposes of first degree robbery. (*People v. Fleetwood* (1985) 171 Cal.App.3d 982, 987–88.)

Robbery in One's Own Residence
A robbery committed in one's own residence is still first degree robbery under Penal Code section 212.5. (Pen. Code, § 212.5; *People v. Alvarado* (1990) 224 Cal.App.3d 1165, 1169 [defendant robbed two salesmen after bringing them back to his hotel room]; *People v. McCullough* (1992) 9 Cal.App.4th 1298, 1300.)

810. Carjacking

The defendant is charged [in Count __] with carjacking.

You may find the defendant guilty of carjacking only if the prosecutor has proven beyond a reasonable doubt that:

1. **The defendant took a motor vehicle that was not (his/her) own.**

2. **The vehicle was taken from another person's possession and immediate presence.**

3. **The defendant knowingly used force or fear to take the vehicle or to prevent the person from resisting.**

4. **The vehicle was taken against the person's will.**

AND

5. **At the time the defendant used force or fear to take the vehicle, (he/she) intended to deprive the person of it either temporarily or permanently.**

[Someone possesses a vehicle if he or she owns it, has physical control over it, or has been given responsibility for or authority over it by the owner.]

[Fear, as used here, means fear of (injury to the person, himself or herself/or/ injury to the person's family or property/or/immediate injury to someone else present during the incident or to that person's property).]

[A vehicle is within a person's immediate presence if it is sufficiently within his or her control and he or she could keep possession of it if not prevented by force or fear.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code, § 215.
Possession Defined ▸ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461.
Fear Defined ▸ Pen. Code, § 212.
Immediate Presence Defined ▸ *People v. Hayes* (1991) 52 Cal.3d 577, 626–27; *People v. Medina* (1995) 39 Cal.App.4th 643, 650.

RELATED ISSUES

Force–Timing
Force or fear must be used against the victim to gain possession of the vehicle. The timing, however, "in no way depends on whether the confrontation and use of force or fear occurs before, while, or after the defendant initially takes possession of the vehicle." (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1133.)

Series 1050 – Arson

1050. Arson

The defendant is charged [in Count __] with arson.

You may find the defendant guilty of arson only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant burned [or (counseled/helped/caused) the burning of] (a structure/forest land/property).

AND

Alternative 2A [if intent is to set a fire]
[2A. (He/She) acted willfully and maliciously.]

Alternative 2B [if intent is to set a fire to a structure, forest land, or property]
[2B. (He/She) acted willfully and maliciously with the intent to burn a (structure/forest land/property).]

To burn means to damage or destroy with fire either all or part of something, no matter how small the part.

A person acts maliciously when he or she does something with the intent to disturb, defraud, annoy, or injure someone else, or to do a wrongful act.

[A structure is any (building/bridge/tunnel/power plant/commercial or public tent).]

[Forest land means brush-covered land, cut-over land, forest, grasslands, or woods.]

[Property means personal property or land other than forest land.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures another person or another person's structure, forest land, or property.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Two alternatives have been provided for the second element, reflecting a split of authority regarding the intent required for arson. (Compare *In re Stonewall* (1989) 208 Cal.App.3d 1054, 1066 with *People v. Glover* (1991) 233 Cal.App.3d 1476, 1483.)

Related Instructions
If it is also alleged that the fire caused great bodily injury or burned an inhabited structure or property, see instructions 1053, Arson: Great Bodily Injury and 1055, Arson: Inhabited Structure.

If attempted arson is charged, do not instruct generally on attempts but give instruction 1075, Attempted Arson. (Pen. Code, § 455.)

AUTHORITY

Elements ▸ Pen. Code, § 451.
Structure, Forest Land, and Maliciously Defined ▸ Pen. Code, § 450.
To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–67.

COMMENTARY

The instruction includes two alternatives defining the scienter requirement for arson. Several Courts of Appeal have held that the perpetrator need only intend to set fire to or burn something and that there is no need to prove an intent to burn the specific targets listed in the statute. (*People v. Glover* (1991) 233 Cal.App.3d 1476; *People v. Lopez* (1993) 13 Cal.App.4th 1840; *People v. Lee* (1994) 28 Cal.App.4th 659; *People v. Fry* (1993) 19 Cal.App.4th 1334, 1338–39.) In contrast, at least one Court of Appeal has construed the statute to require that a person intend to set fire to one of the specified statutory targets. (*In re Stonewall* (1989) 208 Cal.App.3d 1054; see also *People v. Fabris* (1995) 31 Cal.App.4th 685.)[1]

Penal Code section 451 allows conviction for arson if a person "sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of" any of the targets

[1] The Supreme Court has granted review in a case that will probably address this issue. (See *People v. Atkins* (1999) 74 Cal.App.4th 466, review granted November 17, 1999 (S082662) [trial court erred in not admitting evidence of voluntary intoxication in arson case].) In *Atkins*, the court of appeal reasoned that the intent to commit arson was the intent to set fire to a building, structure, or property; therefore, the trial court erred in not admitting evidence of the defendant's voluntary intoxication which was relevant to whether the defendant formed that intent.

listed in the statute. Because this list is redundant, only the following verbs are provided as alternatives in the instruction: burned, counseled, helped, or causes the burning of."

LESSER INCLUDED OFFENSES

Attempted Arson ▸ Pen. Code, § 455.
Unlawfully Causing a Fire ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 on its holding that failure to instruct on this crime as a lesser included offense of arson was invited error because defense counsel objected to such instruction]; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324.

RELATED ISSUES

Aiding and Abetting
Where the prosecution relies on a theory of aiding and abetting to support a charge of arson and the jury is given other instructions regarding aiding and abetting liability, the trial court must define the requirements for aiding and abetting as prescribed by *People v. Beeman* (1984) 35 Cal.3d 547. (*People v. Sarkis* (1990) 222 Cal.App.3d 23, 26–28.)

Fixtures
Fire damage to fixtures within a building may satisfy the burning requirement if the fixtures have become affixed such that they are an integral part of the structure. (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 167–68; *People v. Lee* (1994) 24 Cal.App.4th 1773, 1778 [whether wall-to-wall carpeting is a fixture is question of fact for jury].)

Property – Clothing
Arson includes burning a victim's clothing. (*People v. Reese* (1986) 182 Cal.App.3d 737, 739–40.)

1053. Arson: Great Bodily Injury

The defendant is charged [in Count __] with arson that caused great bodily injury.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant burned [or (counseled/helped/or caused) the burning of] (a structure/forest land/property).

Alternative2A [if intent is to set a fire]
[2A. (He/She) acted willfully and maliciously.]

Alternative 2B [if intent is to set a fire to a structure, forest land, or property]
[2B. (He/She) acted willfully and maliciously with the intent to burn a (structure/forest land/property).]

AND

3. The fire caused great bodily injury to another person. Great bodily injury means a significant or substantial physical injury.

To burn means to damage or destroy with fire either all or part of something, no matter how small the part.

A person acts maliciously when he or she does something with the intent to disturb, defraud, annoy, or injure someone else, or to do a wrongful act.

[A structure is any (building/bridge/tunnel/power plant/commercial or public tent).]

[Forest land means brush-covered land, cut-over land, forest, grasslands, or woods.]

[Property means personal property or land other than forest land.]

[If you find that the defendant willfully and maliciously burned [and had the intent to burn] (a structure/forest land/property), but the fire did not cause great bodily injury, the defendant is guilty of arson.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures another person or another person's structure, forest land, or property.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Two alternatives have been provided for the second element, reflecting a split of authority regarding the intent required for arson. (Compare *In re Stonewall* (1989) 208 Cal.App.3d 1054, 1066 with *People v. Glover* (1991) 233 Cal.App.3d 1476, 1483.)

If an instruction on arson as a lesser included offense is required, instruct using the second to last bracketed paragraph, instead of giving instruction 1050, Arson. If the court instructs on alternative 2B in the elements, which requires an intent to burn one of the targets in the statute, the court must also give the bracketed phrase within this paragraph that includes this intent.

Related Instructions
If attempted arson is charged, do not instruct generally on attempts but give instruction 1075, Attempted Arson. (Pen. Code, § 455.)

AUTHORITY

Elements ▸ Pen. Code, § 451.
Structure, Forest Land, and Maliciously Defined ▸ Pen. Code, § 450.
To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–67.
Great Bodily Injury ▸ Pen. Code, § 12022.7(e).

COMMENTARY

The instruction includes two alternatives defining the scienter requirement for arson. Several Courts of Appeal have held that the perpetrator need only intend to set fire to or burn something and that there is no need to prove an intent to burn the specific targets listed in the statute. (*People v. Glover* (1991) 233 Cal.App.3d 1476; *People v. Lopez* (1993) 13 Cal.App.4th 1840; *People v. Lee* (1994) 28 Cal.App.4th 659; *People v. Fry* (1993) 19 Cal.App.4th 1334, 1338–39.) In contrast, at least one Court of Appeal has construed the statute to require that a person intend to set fire to one of the specified

statutory targets. (*In re Stonewall* (1989) 208 Cal.App.3d 1054; see also *People v. Fabris* (1995) 31 Cal.App.4th 685.)[2]

Penal Code section 451 allows conviction for arson if a person "sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of" any of the targets listed in the statute. Because this list is redundant, only the following verbs are provided as alternatives in the instruction: burned, counseled, helped, or caused the burning of.

RELATED ISSUES

See generally, the related issues section under instruction 1050, Arson.

[2] The SupremeCourt has granted review in a case that will probably address this issue. (See *People v. Atkins* (1999) 74 Cal.App.4th 466, review granted November 17, 1999 (S082662) [trial court erred in not admitting evidence of voluntary intoxication in arson case].) In *Atkins*, the court of appeal reasoned that the intent to commit arson was the intent to set fire to a building, structure, or property; therefore, the trial court erred in not admitting evidence of the defendant's voluntary intoxication which was relevant to whether the defendant formed that intent.

1055. Arson: Inhabited Structure

The defendant is charged [in Count __] with arson that burned an inhabited structure.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant burned [or (counseled/helped/or caused) the burning of (a structure/forest land/property.)

Alternative 2A [if intent is to set a fire]
[2A. (He/She) acted willfully and maliciously.]

Alternative 2B [if intent is to set a fire to a structure, forest land, or property]
[2B. (He/She) acted willfully and maliciously with the intent to burn a (structure/forest land/property).]

AND

3. The fire burned an inhabited structure.

A structure is any (building /bridge/tunnel/power plant/commercial or public tent.) A structure is inhabited if someone lives there and (a) is present or (b) has left but intends to return.

[Forest land means brush-covered land, cut-over land, forest, grasslands, or woods.]

[Property means personal property or land other than forest land.]

To burn means to damage or destroy with fire either all or part of something, no matter how small the part.

A person acts maliciously when he or she does something with the intent to disturb, defraud, annoy, or injure someone else, or to do a wrongful act.

[If you find that the defendant willfully and maliciously burned [and had the intent to burn] (a structure/forest land/property), but the fire did not cause an inhabited structure to burn, the defendant is guilty of arson.]

[A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures another person or another person's structure, forest land, or property.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Two alternatives have been provided for the second element reflecting a split of authority regarding the intent required for arson. (Compare *In re Stonewall* (1989) 208 Cal.App.3d 1054, 1066 with *People v. Glover* (1991) 233 Cal.App.3d 1476, 1483.)

If an instruction on arson as a lesser included offense is required, instruct using the second to last bracketed paragraph, instead of giving instruction 1050, Arson. If the court instructs on alternative 2B in the elements, which requires an intent to burn one of the targets in the statute, the court must also give the bracketed phrase within this paragraph that includes this intent.

Related Instructions
If attempted arson is charged, do not instruct generally on attempts but give instruction 1075, Attempted Arson. (Pen. Code, § 455.)

AUTHORITY

Elements ▸ Pen. Code, § 451.
Structure, Forest Land, and Maliciously Defined ▸ Pen. Code, § 450.
To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–67.
Inhabited Defined ▸ Pen. Code, § 450; *People v. Jones* (1988) 199 Cal.App.3d 543.

COMMENTARY

The instruction includes two alternatives defining the scienter requirement for arson. Several Courts of Appeal have held that the perpetrator need only intend to set fire to or burn something and that there is no need to prove an intent to burn the specific targets listed in the statute. (*People v. Glover* (1991) 233 Cal.App.3d 1476; *People v. Lopez* (1993) 13 Cal.App.4th 1840; *People v. Lee* (1994) 28 Cal.App.4th 659; *People v. Fry* (1993) 19 Cal.App.4th 1334, 1338–39.) In contrast, at least one Court of Appeal has construed the statute to require that a person intend to set fire to one of the specified

statutory targets. (*In re Stonewall* (1989) 208 Cal.App.3d 1054; see also *People v. Fabris* (1995) 31 Cal.App.4th 685.)[3]

Penal Code section 451 allows conviction for arson if a person "sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of" any of the targets listed in the statute. Because this list is redundant, only the following verbs are provided as alternatives in the instruction: burned, counseled, helped, or caused the burning of.

RELATED ISSUES

Inhabited—Apartment

Defendant's conviction for arson of an inhabited structure was proper where he set fire to his estranged wife's apartment several days after she had vacated it. Although his wife's apartment was not occupied, it was in a large apartment building where many people lived; it was, therefore, occupied for purposes of the arson statute. (*People v. Green* (1983) 146 Cal.App.3d 369, 378–79.)

[3] The Supreme Court has granted review in a case that will probably address this issue. (See *People v. Atkins* (1999) 74 Cal.App.4th 466, review granted November 17, 1999 (S082662) [trial court erred in not admitting evidence of voluntary intoxication in arson case].) In *Atkins*, the court of appeal reasoned that the intent to commit arson was the intent to set fire to a building, structure, or property; therefore, the trial court erred in not admitting evidence of the defendant's voluntary intoxication which was relevant to whether the defendant formed that intent.

1060. Unlawfully Causing a Fire

The defendant is charged [in Count __] with unlawfully causing a fire.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant burned or caused the burning of (a structure/forest land/property).

AND

2. The defendant did so recklessly.

Recklessness – General Definition

[A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of causing a fire, (2) he or she knowingly ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

Recklessness – Voluntary Intoxication

[A person acts recklessly when (1) he or she does an act that presents a substantial and unjustifiable risk of causing a fire but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

To burn means to damage or destroy with fire either all or part of something, no matter how small the part.

[A structure is any (building/bridge/tunnel/power plant/commercial or public tent).]

[Forest land means brush-covered land, cut-over land, forest, grasslands, or woods.]

[Property means personal property or land other than forest land.]

[A person does not unlawfully cause a fire if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures another person or another person's structure, forest land, or property.]

[Arson and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Depending upon the theory of recklessness the prosecutor is alleging, the court should instruct with alternative A or B.

If the defendant is also charged with arson, the court may wish to give the last bracketed paragraph, which explains the difference in intent between unlawfully causing a fire and arson. (*People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 on the point that defense counsel's objection to instruction on lesser included offense constituted invited error]; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324.)

Related Instructions
If it is also alleged that the fire caused great bodily injury or burned an inhabited structure or property, see instructions 1063, Unlawfully Causing a Fire: Great Bodily Injury and 1065, Unlawfully Causing a Fire: Inhabited Structure.

AUTHORITY

Elements ▸ Pen. Code, § 452.
Structure, Forest Land Defined ▸ Pen. Code, § 450.
To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–67.
Difference Between This Crime and Arson ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182.

COMMENTARY

Penal Code section 452 allows conviction for unlawfully causing a fire if a person recklessly "sets fire to or burns or causes to be burned" any of the targets listed in the statute. Because "sets fire to" is redundant, only burned or caused the burning of have been included in the instruction.

RELATED ISSUES

See generally, the related issues section under instruction 1050, Arson.

1063. Unlawfully Causing a Fire: Great Bodily Injury

The defendant is charged [in Count __] with unlawfully causing a fire that caused great bodily injury.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant burned or caused the burning of (a structure/forest land/property).

2. The defendant did so recklessly.

AND

3. The fire caused great bodily injury to another person. Great bodily injury means a significant or substantial physical injury.

Recklessness – General Definition

[A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of causing a fire, (2) he or she knowingly ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

Recklessness – Voluntary Intoxication

[A person acts recklessly when (1) he or she does an act that presents a substantial and unjustifiable risk of causing a fire but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

To burn means to damage or destroy with fire either all or part of something, no matter how small the part.

[A structure is any (building/bridge/tunnel/power plant/commercial or public tent).]

[Forest land means brush-covered land, cut-over land, forest, grasslands, or woods.]

[Property means personal property or land other than forest land.]

[If you find that the defendant recklessly burned (a structure/forest land/property), but the fire did not cause great bodily injury, the defendant is guilty of unlawfully causing a fire.]

[A person does not unlawfully cause a fire if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures another person or another person's structure, forest land, or property.]

[Arson and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Depending upon the theory of recklessness the prosecutor is alleging, the court should instruct with alternative A or B.

If the defendant is also charged with arson, the court may wish to give the last bracketed paragraph, which explains the difference in intent between unlawfully causing a fire and arson. (*People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 on the point that defense counsel's objection to instruction on lesser included offense constituted invited error]; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324.)

If an instruction on unlawfully causing a fire as a lesser included offense is required, instruct using the bracketed paragraph explaining the difference between the two crimes, instead of giving instruction 1060, Unlawfully Causing a Fire.

AUTHORITY

Elements ▸ Pen. Code, § 452.
Great Bodily Injury ▸ Pen. Code, § 12022.7(e).
Structure, Forest Land Defined ▸ Pen. Code, § 450.
To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–67.
Difference Between This Crime and Arson ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182.

COMMENTARY

Penal Code section 452 allows conviction for unlawfully causing a fire if a person recklessly "sets fire to or burns or causes to be burned" any of the targets listed in the statute. Because "sets fire to" is redundant, only burned or caused the burning of have been included in the instruction.

RELATED ISSUES

See generally, the related issues sections under instructions 1050, Arson and 1060, Unlawfully Causing a Fire.

1065. Unlawfully Causing a Fire: Inhabited Structure

The defendant is charged [in Count __] with unlawfully causing a fire that burned an inhabited structure.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant burned, set fire to, or caused the burning of (a structure/forest land/property).

2. The defendant did so recklessly.

AND

3. The fire burned an inhabited structure.

Recklessness – General Definition

[A person acts recklessly when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of causing a fire, (2) he or she knowingly ignores that risk, and (3) ignoring the risk is a gross deviation from what a reasonable person would have done in the same situation.]

Recklessness – Voluntary Intoxication

[A person acts recklessly when (1) he or she does an act that presents a substantial and unjustifiable risk of causing a fire but (2) he or she is unaware of the risk because he or she is voluntarily intoxicated. Intoxication is voluntary if the defendant willingly used any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect.]

To burn means to damage or destroy with fire either all or part of something, no matter how small the part.

A structure is a (building/bridge/tunnel/power plant/commercial or public tent). A structure is inhabited if someone lives there and (a) is present or (b) has left but intends to return.

[Forest land means brush-covered land, cut-over land, forest, grasslands, or woods.]

[Property means personal property or land other than forest land.]

[If you find that the defendant recklessnly burned (a structure/forest land/property), but the fire did not cause an inhabited structure to burn, the defendant is guilty of unlawfully causing a fire.]

[A person does not unlawfully cause a fire if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures another person or another person's structure, forest land, or property.]

[Arson and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Depending upon the theory of recklessness the prosecutor is alleging, the court should instruct with alternative A or B.

If the defendant is also charged with arson, the court may wish to give the last bracketed paragraph, which explains the difference in intent between unlawfully causing a fire and arson. (*People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182 [disapproved of in *People v. Barton* (1995) 12 Cal.4th 186 on the point that defense counsel's objection to instruction on lesser included offense constituted invited error]; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324.)

If an instruction on unlawfully causing a fire as a lesser included offense is required, instruct using the bracketed paragraph explaining the difference between the two crimes, instead of giving instruction 1060, Unlawfully Causing a Fire.

AUTHORITY

Elements ▸ Pen. Code, § 452.
Structure, Forest Land Defined ▸ Pen. Code, § 450.
Inhabited Defined ▸ Pen. Code, § 450; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 838, 848; *People v. Jones* (1988) 199 Cal.App.3d 543.
To Burn Defined ▸ *People v. Haggerty* (1873) 46 Cal. 354, 355; *In re Jesse L.* (1990) 221 Cal.App.3d 161, 166–67.
Difference Between This Crime and Arson ▸ *People v. Hooper* (1986) 181 Cal.App.3d 1174, 1182.

COMMENTARY

Penal Code section 452 allows conviction for unlawfully causing a fire if a person recklessly "sets fire to or burns or causes to be burned" any of the targets listed in the statute. Because "sets fire to" is redundant, only burned or caused the burning of have been included in the instruction.

RELATED ISSUES

See generally, the related issues sections under instructions 1050, Arson and 1060, Unlawfully Causing a Fire.

1070. Possession of Incendiary Device

The defendant is charged [in Count __] with possessing an incendiary device or flammable material.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant (possessed/made/manufactured/disposed of) flammable or combustible material or an incendiary device in an arrangement or preparation.

AND

2. The defendant willfully and maliciously intended to use the material or device to burn (a structure/forest land/property).

A person acts maliciously when he or she does something with the intent to disturb, defraud, annoy, or injure someone else, or to do a wrongful act.

Incendiary device means a device constructed or designed to start an incendiary fire by instant, remote or delayed means. [It is not a device commercially manufactured primarily for illumination.]

Incendiary fire means a fire deliberately ignited under circumstances in which a person knows that the fire should not be ignited.

[Dispose of means to give, give away, offer, offer for sale, sell, transfer, or loan.]

[A structure means any (building/bridge/tunnel/power plant/commercial or public tent).]

[Forest land means any brush-covered land, cut-over land, forest, grasslands, or woods.]

[Property means personal property or land other than forest land.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code, § 453.
Manufacture Defined ▸ *People* v. *Combs* (1985) 165 Cal.App.3d 422, 427.
Structure and Forest Land Defined ▸ Pen. Code, § 450.

COMMENTARY

Penal Code section 453 allows conviction for possession of an incendiary device if a person possesses such a device with the intent to use the device to "set fire to or burn" any of the targets listed in the statute. Because "set fire to" is redundant, only burned was included in the instruction.

1075. Attempted Arson

The defendant is charged [in Count __] with the crime of attempted arson. You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

> **The defendant willfully and maliciously attempted to burn [or counseled, aided in, or procured the attempted burning of] (a structure/forest land/property).**

A person tries to burn (a structure/forest land/property) when he or she places any flammable, explosive, or combustible material or device in or around it with the intent to set fire to it.

A person acts maliciously when he or she does something with the intent to disturb, defraud, annoy, or injure someone else, or to do a wrongful act.

[A structure is any (building/bridge/tunnel/power plant/commercial or public tent).]

[Forest land is any brush-covered land, cut-over land, forest, grasslands, or woods.]

[Property means personal property or land other than forest land.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Attempted arson is governed by Penal Code section 455, not the general attempt statute found in section 664. (*People* v. *Alberts* (1995) 32 Cal.App.4th 1424, 1427–28 [defendant was convicted under sections 451 and 664. The higher sentence was reversed because section 455 governs attempted arson].)

Unlike other arson offenses, there does not appear to be an exception in attempted arson for burning one's own property. (See Pen. Code, §§ 451(d), 452(d).)

AUTHORITY

Elements ▸ Pen. Code, § 455.
Structure, Forest Land, and Maliciously Defined ▸ Pen. Code, § 450.

RELATED ISSUES

See generally, instructions 1050, Arson and 1060, Unlawfully Causing a Fire.

Series 1100 – Sex Offenses

1100 Rape by Force, Fear, or Threats
1105 Rape of an Intoxicated Woman
1108 Rape of an Unconscious Woman
1110 Rape of a Disabled Woman
1114 Rape by Fraud
1120 Oral Copulation By Force, Fear or Threats
1125 Oral Copulation of an Intoxicated Person
1128 Oral Copulation of an Unconscious Person
1130 Oral Copulation of a Disabled Person
1132 Oral Copulation of a Disabled Person in a Mental Hospital
1134 Oral Copulation by Fraud
1135 Oral Copulation While in Custody

1100. Rape by Force, Fear, or Threats

The defendant is charged [in Count[s] __] with forcible rape.

You may find the defendant guilty of forcible rape only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant had sexual intercourse with a woman.

2. He and woman were not married.

3. The woman did not consent to the intercourse.

AND

4. The defendant accomplished the intercourse:

Alternative 4A—force and fear

[by force, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to another person.]

Alternative 4B—future threats of bodily harm

[by threatening to retaliate against the woman or any other person when there was a reasonable possibility that the threat would be carried out. A threat to retaliate is a threat to kidnap, falsely imprison, or inflict extreme pain, serious bodily injury, or death.]

Alternative 4C—threat of official action

[by threatening to use the authority of a public official to incarcerate, arrest, or deport someone. A public official is a person employed by federal, state, or local government who has authority to incarcerate, arrest, or deport. The woman must have reasonably believed that the defendant was a public official even if he was not.]

Sexual intercourse includes any penetration, however slight, of the woman's vagina by the man's penis.

The burden is on the prosecutor to prove that the woman did not consent.

[A woman consents when she acts freely and voluntarily and knows the nature of the act or transaction involved.]

[The fact that the defendant and the woman had a dating or marital relationship does not necessarily mean that she consented.]

[The fact that the woman (requested/suggested/communicated) that the defendant use a condom or other birth control device does not necessarily mean that she consented.]

[Duress is a direct or implied threat of force, danger, or retribution that causes a reasonable person to do or submit to something she would not do or submit to otherwise. When deciding whether duress was proved, consider all the circumstances, including the woman's age and her relationship to the defendant.]

[Menace means a threat to injure someone.]

[The act was accomplished by force if the defendant used enough physical force to overcome the woman's will. The force must have been substantially different from or substantially greater than the force needed to accomplish intercourse.]

[The act was accomplished by fear if the woman was actually afraid and her fear was reasonable [or her fear was unreasonable and the defendant knew of her fear and took advantage of it].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If multiple theories of rape are charged, the definition of sexual intercourse does not have to be given for each type of rape. If a child is the victim, "girl" should be used instead of "woman."

Related Instructions

If a defense of mistaken belief in consent is asserted, give instruction __, Reasonable Belief in Consent.

AUTHORITY

Elements ▸ Pen. Code, § 261.
Duress Defined ▸ Pen. Code, § 261(b).
Menace Defined ▸ Pen. Code, § 261(c).
Force Defined ▸ *People v. Bergschneider* (1989) 211 Cal.App.3d 144 [amount of force]; *People v. Young* (1987) 190 Cal.App.3d 248 [same].
Fear Defined ▸ *People v. Iniguez* (1994) 7 Cal.4th 847 [level of fear].
Consent Defined ▸ Pen. Code, §§ 261.6, 261.7.

COMMENTARY

This instruction defines intercourse as penetration of the vagina. However, all that is required is penetration of the genital area. If this presents an issue, the court should further define penetration. (See *People v. Kaiser* (1982) 131 Cal.App.3d 224, 233–34, disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585.)

Gender-specific language is used because rape always occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

Penal Code section 261 requires that the intercourse be "against the will" of the other person. (Pen. Code, § 261.) "Against the will" has been defined as without consent. (*People v. Key* (1984) 154 Cal.App.3d 888, 895; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257.)

The instruction includes definitions of "duress," "menace," and the sufficiency of "force" and "fear" because those terms have meanings in the context of rape that are technical and may not be readily apparent to jurors. (See *People v. Bergschneider* (1989) 211 Cal.App.3d 144 [force]; *People v. Young* (1987) 190 Cal.App.3d 248 [force]; *People v. Iniguez* (1994) 7 Cal.4th 847 [fear]; Pen. Code, §§ 261(b) [duress] and (c) [menace].)

The statute uses the term "violence" in addition to "force," "duress," "menace," and "fear." (Pen. Code, § 261(a).) Because a finding of violence necessarily implies a finding of force, the word violence was not used in the instruction. (See *People v. McIlvain* (1942) 55 Cal.App.2d 322, 328–29.)

LESSER INCLUDED OFFENSES

Attempted Rape ▸ Pen. Code, §§ 663, 261.
Battery ▸ Pen. Code, § 242; *People v. Guiterrez* (1991) 232 Cal.App.3d 1624, 1636; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38–39 [battery not a lesser included of attempted rape].
Simple Assault ▸ Pen. Code, § 240.
Assault With Intent to Commit Rape ▸ *In re Jose* (1994) 21 Cal.App.4th 1470, 1477; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [where forcible rape is charged].

RELATED ISSUES

Multiple Rapes
A penetration, however slight, completes the crime of rape; therefore a separate conviction is proper for each penetration that occurs. (*People v. Harrison* (1989) 48 Cal.3d 321, 329–34.)

Resistance Is Not Required
Resistance by the victim is not required for rape; any instruction to that effect is erroneous. (*People v. Barnes* (1986) 42 Cal.3d 284, 302.)

Victim Must Be Alive
Rape requires that the victim is alive at the moment of intercourse. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175–77; *People v. Carpenter* (1997) 15 Cal.4th 312, 391.) Intercourse with a deceased victim may constitute attempted rape if the defendant intended to rape a live victim. (*People v. Kelly* (1992) 1 Cal.4th 495, 524–28.)

Withdrawal of Consent
It is unclear whether the defendant is guilty of rape if consent is given by the woman before or at the moment of penetration, but withdrawn after the penetration. In *People v. Vela* (1985) 172 Cal.App.3d 237, 242–44, the court found penetration to be the defining issue and held that if consent is withdrawn after penetration, the defendant is not guilty of rape if he continues that act of intercourse. He may, however, be found guilty of other crimes such as assault or battery. (*Ibid.*) Conversely, in *People v. Roundtree* (1999) 77 Cal.App.4th 846, 851–52, the court declined to follow *Vela* and held that once consent is withdrawn, continuing the act of intercourse is rape. In arriving at its decision, *Roundtree* found that rape is concerned with the outrage to the victim's person and feelings and that any sexual intercourse against a woman's will is rape regardless of whether she gave consent at the moment of penetration. (*Ibid.*)

1105. Rape of an Intoxicated Woman

The defendant is charged [in Count __] with raping an intoxicated woman.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant had sexual intercourse with a woman.

2. The defendant and woman were not married.

3. An (intoxicating/anesthetic/controlled) substance prevented the woman from resisting.

AND

4. The defendant knew or reasonably should have known that the effect of an (intoxicating/anesthetic/controlled) substance prevented the woman from resisting.

[_____ *[if appropriate, insert controlled substance]* **is a controlled substance.]**

Sexual intercourse includes any penetration, however slight, of the woman's vagina by the man's penis.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If a child is the victim, "girl" should be used instead of "woman." A space has been provided to identify controlled substances if the parties agree that there is no issue of fact.

AUTHORITY

Elements ▸ Pen. Code, §§ 261(a)(3), 262(a)(2).

COMMENTARY

This instruction defines intercourse as penetration of the vagina. However, all that is required is penetration of the genital area. If this presents an issue, the court should further define penetration. (See *People v. Kaiser* (1982) 131 Cal.App.3d 224, 233–34, disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585.)

Gender-specific language is used because rape always occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

LESSER INCLUDED OFFENSES

Attempted Rape ▸ Pen. Code, §§ 663, 261.

RELATED ISSUES

See generally, the related issues section under instruction 1100, Rape by Force, Fear, or Threats.

1108. Rape of an Unconscious Woman

The defendant is charged [in Count __] with raping a woman unconscious of the nature of the act.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant had sexual intercourse with a woman.

2. He and the woman were not married.

3. The woman was unable to resist because she was unconscious of the nature of the act.

AND

4. The defendant knew that the woman was unable to resist because she was unconscious of the nature of the act.

A woman is unconscious of the nature of the act if she (a) is unconscious or asleep, (b) is not aware that the act is occurring, or (c) is not aware of the essential characteristics of the act because of fraud by the perpetrator.

Sexual intercourse includes any penetration, however slight, of the woman's vagina by the man's penis.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If a child is the victim, "girl" should be used instead of "woman."

AUTHORITY

Elements ▸ Pen. Code, §§ 261(a)(3), 262(a)(2), and 263.

COMMENTARY

This instruction defines intercourse as penetration of the vagina. However, all that is required is penetration of the genital area. If this presents an issue, the court should

further define penetration. (See *People v. Kaiser* (1982) 131 Cal.App.3d 224, 233–34, disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585.)

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, § 261.) The committee could not perceive any differences between the statutory terms and therefore used only "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

Gender-specific language is used because rape always occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

LESSER INCLUDED OFFENSES

Attempted Rape ▸ Pen. Code, §§ 663, 261.

RELATED ISSUES

See generally, the related issues section under instruction 1100, Rape by Force, Fear, or Threats.

1110. Rape of a Disabled Woman

The defendant is charged [in Count __] with raping a mentally or physically disabled woman.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant had sexual intercourse with a woman.

2. He and the woman were not married.

3. The woman had a (mental disorder/developmental or physical disability) that prevented her from legally consenting.

AND

4. The defendant knew or reasonably should have known the woman had a (mental or physical disability) that prevented her from legally consenting.

A woman is capable of giving legal consent if she has a level of intelligence that is capable of understanding the act, its nature, and possible consequences.

Sexual intercourse includes any penetration, however slight, of the woman's vagina by the man's penis.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If a child is the victim, "girl" should be used instead of "woman."

AUTHORITY

Elements ▸ Pen. Code, §§ 261, 263.

COMMENTARY

This instruction defines intercourse as penetration of the vagina. However, all that is required is penetration of the genital area. If this presents an issue, the court should

further define penetration. (See *People v. Kaiser* (1982) 131 Cal.App.3d 224, 233–34, disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585.)

Gender-specific language is used because rape always occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

LESSER INCLUDED OFFENSES

Attempted Rape ▸ Pen. Code, §§ 663, 261.

RELATED ISSUES

See generally, the related issues section under instruction 1110, Rape by Force, Fear, or Threats.

1114. Rape by Fraud

The defendant is charged [in Count __] with rape by fraud.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant had sexual intercourse with a woman.

2. He and the woman were not married.

3. The woman submitted to the intercourse because she believed the defendant was her husband.

AND

4. The defendant used a trick, told a lie, or concealed information intending to make her believe they were married.

Sexual intercourse includes any penetration, however slight, of the woman's vagina by the man's penis.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If a child is the victim, "girl" should be used instead of "woman."

AUTHORITY

Elements ▸ Pen. Code, § 261(a)(5).

COMMENTARY

This instruction has defined intercourse as penetration of the vagina. However, all that is required is penetration of the genital area. If this presents an issue, the court should further define penetration. (See *People v. Kaiser* (1982) 131 Cal.App.3d 224, 233–34, disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585.)

Gender-specific language is used because rape always occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

LESSER INCLUDED OFFENSES

Attempted Rape ▸ Pen. Code, §§ 663, 261.

RELATED ISSUES

See generally, the related issues section under instruction 1100, Rape by Force, Fear, or Threats.

1120. Oral Copulation by Force, Fear, or Threats

The defendant is charged [in Count __] with forcible oral copulation.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant accomplished an act of oral copulation with another person.

2. The other person did not consent to the act.

AND

3. The defendant accomplished the act:

Alternative 3A—force and fear

[by force, duress, menace, or fear of immediate and unlawful bodily injury to any person.]

Alternative 3B—future threats of bodily harm

[by threatening to retaliate against someone when there was a reasonable possibility that the threat would be carried out. A threat to retaliate is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

Alternative 3C—threat of official sanction

[by threatening to use the authority of a public official to incarcerate, arrest, or deport someone. A public official is a person employed by a government agency who has the authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if he or she was not.]

Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

The burden is on the prosecutor to prove that the other person did not consent.

[A person consents when he or she acts freely and voluntarily and knows the nature of the act or transaction involved.]

[The fact that the parties had a dating or marital relationship does not necessarily mean that the other person consented.]

[The fact that the other person (requested/suggested/communicated) that the defendant use a condom or other birth control device does not necessarily mean that (he/she) consented.]

[Duress is a direct or implied threat of force, danger, or retribution that causes a reasonable person to do or submit to something that he or she would not otherwise do. When deciding whether there was duress, consider all the circumstances, including the age of the other person and (his/her) relationship to the defendant.]

[Menace means a threat to injure someone.]

[The act was accomplished by force if the defendant used enough physical force to overcome the other person's will. The force must have been substantially different from or substantially greater than the force needed simply to accomplish the act.]

[The act was accomplished by fear if the other person was actually afraid and (his/her) fear was reasonable] [or] [(his/her) fear was unreasonable and the defendant knew of (his/her) fear and took advantage of it].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Related Instructions

If a defense of mistaken belief in consent is asserted, give instruction __, Reasonable Belief in Consent.

AUTHORITY

Elements ▸ Pen. Code, § 288a.
Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–43.
Duress Defined ▸ Pen. Code, § 261(b).
Menace Defined ▸ Pen. Code, § 261(c).
Force Defined ▸ *People v. Senior* (1992) 3 Cal.App.4th 765, 774 [amount of force]; *People v. Young* (1987) 190 Cal.App.3d 248 [in context of rape].
Fear Defined ▸ *People v. Reyes* (1984) 153 Cal.App.3d 803; *People v. Iniguez* (1994) 7 Cal.4th 847 [in context of rape].

Consent Defined ‣ Pen. Code, §§ 261.6, 267.1.

COMMENTARY

Penal Code section 288a requires that the intercourse be "against the will" of the other person. (Pen. Code, § 288a.) "Against the will" has been defined as "without consent." (*People v. Key* (1984) 154 Cal.App.3d 888, 895; see also *People v. Young* (1987) 190 Cal.App.3d 248, 257.)

The instruction includes definitions of "duress," "menace," and the sufficiency of "force" and "fear" because those terms have meanings in the context of oral copulation that are technical and may not be readily apparent to jurors. (See *People v. Senior* (1992) 3 Cal.App.4th 765, 774 [force]; *People v. Bergshneider* (1989) 211 Cal.App.3d 144, 152–53 [force]; *People v. Reyes* (1984) 153 Cal.App.3d 803, 810 [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–57 [fear in context of rape].)

Penal Code section 288a does not explicitly define duress and menace. The definitions of these terms are based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. When describing acts of rape and oral copulation by force, both statutes use the same language requiring that the act be accomplished "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim." If a definition of duress and menace is requested, the definition provided in the rape statute should, by analogy, be applicable to the same terms used in the oral copulation statute. (*Frediani v. Ota* (1963) 215 Cal.App.2d 127, 133 [when interpreting a term used in several similar statutes, reference to those other statutes may provide guidance in interpreting the term in the instant statute].) No authority mandates that either term must be defined for the jury.

The statute uses the term "violence" in addition to "force," "duress," "menace," and "fear." (Pen. Code, § 261(a).) Because a finding of violence necessarily implies a finding of force, the word violence was not used in the instruction. (See *People v. McIlvain* (1942) 55 Cal.App.2d 322, 328–29.)

LESSER INCLUDED OFFENSES

Attempted Oral Copulation ‣ Pen. Code, §§ 663, 288a.
Battery ‣ Pen. Code, § 242.
Simple Assault ‣ Pen. Code, § 240.

RELATED ISSUES

See generally, the related issues section under instruction 1100, Rape by Force, Fear, or Threats.

Multiple Acts of Oral Copulation
An accused may be convicted for multiple, nonconsensual sex acts of an identical nature that follow one another in quick, uninterrupted succession. (*People v. Catelli* (1991) 227 Cal.App.3d 1434, 1446–47 [defendant properly convicted of multiple violations of Pen. Code, §288a where he interrupted the acts of copulation and forced victims to change positions].)

Sexual Organ
A man's "sexual organ" for purposes of Penal Code section 288a includes the penis and the scrotum. (Pen. Code, § 288a; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1448.)

1125. Oral Copulation of an Intoxicated Person

The defendant is charged [in Count __] with oral copulation of an intoxicated person.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant engaged in oral copulation with another person.

2. An (intoxicating/anesthetic/controlled) substance prevented the other person from resisting.

AND

3. The defendant knew or reasonably should have known that the effect of an (intoxicating/anesthetic/controlled) substance prevented the other person from resisting.

[_____ *[if appropriate, insert controlled substance]* **is a controlled substance.]**

Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. A space has been provided to identify controlled substances if the parties agree that there is no issue of fact.

AUTHORITY

Elements ▸ Pen. Code, § 288a.
Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–43.

LESSER INCLUDED OFFENSES

Attempted Oral Copulation ▸ Pen. Code, §§ 663, 288a.

RELATED ISSUES

See generally, the related issues section under instructions 1120, Oral Copulation by Force, Fear, or Threats and 1100, Rape by Force, Fear, or Threats.

1128. Oral Copulation of an Unconscious Person

The defendant is charged [in Count __] with oral copulation of an unconscious person.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant engaged in an act of oral copulation with another person.

2. The other person was unable to resist because (he/she) was unconscious of the nature of the act.

AND

3. The defendant knew that the other person was unable to resist because (he/she) was unconscious of the nature of the act.

A person is unconscious of the nature of the act if he or she (a) is unconscious or asleep, (b) is not aware that the act is occurring, or (c) is not aware of the essential characteristics of the act because of fraud by the perpetrator.

Oral copulation is any contact, no matter how slight, between the mouth of one person and the anus or sexual organ of another person. Penetration is not required.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code, § 288a.
Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–43.

COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, § 288a(f).) The committee could not perceive any difference between the statutory terms and therefore

used “aware” in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

LESSER INCLUDED OFFENSES

Attempted Oral Copulation ‣ Pen. Code, §§ 663, 288a.

RELATED ISSUES

See generally, the related issues section under instructions 1120, Oral Copulation by Force, Fear, or Threats and 1100, Rape by Force, Fear, or Threats.

1130. Oral Copulation of a Disabled Person

The defendant is charged [in Count __] with oral copulation of a mentally or physically disabled person.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant engaged in an act of oral copulation with another person.

2. The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting.

AND

3. The defendant knew or reasonably should have known that the other person had a (mental or physical disability) that prevented (him/her) from legally consenting.

A person is capable of giving legal consent if he or she has a level of intelligence that is capable of understanding the act, its nature, and possible consequences.

Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code, § 288a.
Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–43.

LESSER INCLUDED OFFENSES

Attempted Oral Copulation ▸ Pen. Code, §§ 663, 288a.

RELATED ISSUES

See generally, the related issues section under instructions 1120, Oral Copulation by Force, Fear, or Threats and 1100, Rape by Force, Fear, or Threats.

1132. Oral Copulation of a Disabled Person in a Mental Hospital

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The defendant is charged [in Count __] with oral copulation of a mentally or physically disabled person in a mental hospital.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant engaged in an act of oral copulation with another person.

2. The other person had a (mental disorder/developmental or physical disability) that prevented (him/her) from legally consenting.

3. The defendant knew or reasonably should have known that the other person had a (mental or physical disability) that prevented (him/her) from legally consenting.

AND

4. At the time of the act, both people were confined in a state hospital or other mental health facility.

A person is capable of giving legal consent if he or she has a level of intelligence that is capable of understanding the act, its nature, and possible consequences.

Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code, § 288a.
Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–43.
Legal Consent ▸ *People v. Boggs* (1930) 107 Cal.App. 492, 495–96.

LESSER INCLUDED OFFENSES

Attempted Oral Copulation ▸ Pen. Code, §§ 663, 288a.

RELATED ISSUES

See generally, the related issues section under instructions 1120, Oral Copulation by Force, Fear, or Threats and 1100, Rape by Force, Fear, or Threats.

1134. Oral Copulation by Fraud

The defendant is charged [in Count __] with oral copulation by fraud.

You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant engaged in an act of oral copulation with another person.

2. The other person submitted to the oral copulation because (he/she) believed the person was (his/her) spouse.

AND

3. The defendant used a trick, told a lie, or concealed information intending to make the other person believe they were married.

Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code, § 288a.
Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–43.

LESSER INCLUDED OFFENSES

Attempted Oral Copulation ▸ Pen. Code, §§ 663, 288a.

RELATED ISSUES

See generally, the related issue section under instruction, 1120, Oral Copulation by Force, Fear, or Threats and 1100, Rape by Force, Fear or Threats.

1135. Oral Copulation While in Custody

The defendant is charged [in Count __] with oral copulation committed while (he/she) was confined in (state prison/a local detention facility).

You may find the defendant guilty of this crime only if the prosecutor has beyond a reasonable doubt that:

1. The defendant engaged in an act of oral copulation with another person.

AND

2. At the time of the act, the defendant was confined in a state prison, jail, or other detention facility.

[_____ *[insert name of facility]***] is a (local detention facility/state prison).**

Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If there is a factual dispute about whether the institution is a local detention facility or state prison, further instruction should be given defining both using Penal Code sections 4054 and 6031.4.

AUTHORITY

Elements ▸ Pen. Code, § 288a.
Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–43.

LESSER INCLUDED OFFENSES

Attempted Oral Copulation ▸ Pen. Code, §§ 663, 288a.

RELATED ISSUES

See generally, the related issues section under instructions 1120, Oral Copulation by Force, Fear, or Threats and 1100, Rape by Force, Fear, or Threats.

Series 1300 – Theft

1300. Theft by Larceny

The defendant is charged [in Count _____] with [grand] [petty] theft [by larceny].

You may find the defendant guilty of [grand] [petty] theft [by larceny] only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant took property that (he/she) knew was owned by someone else.

2. (He/She) took the property without the owner's consent.

3. When (he/she) took the property, (he/she) intended to deprive the owner of it permanently.

AND

4. (He/She) kept the property for any length of time.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the property stolen is money, the court may want to substitute that word instead of property in the elements.

Related Instructions
If the defendant is charged with grand theft, also give instruction 1305, Theft: Degrees. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form. If a different theory of theft is presented, see instructions 1308, Theft by False Pretenses; 1310, Theft by Trick; and 1312, Theft by Embezzlement. The court may also wish to instruct with the bracketed [by larceny] in the first sentence to distinguish this theory of theft from the others.

AUTHORITY

Elements ▸ Pen. Code, § 484; *People v. Williams* (1946) 73 Cal.App.2d 154, 157; *People v. Edwards* (1925) 72 Cal.App. 102, 112–17, disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748.

LESSER INCLUDED OFFENSES

Petty Theft ▸ Pen. Code, § 486.
Attempted Theft ▸ Pen. Code, §§ 663, 484.
Taking an Automobile Without Consent ▸ Veh. Code, § 10851; *People v. Pater* (1968) 267 Cal.App.2d 921, 926.
Auto Tampering ▸ Veh. Code, § 10852; *People v. Anderson* (1975) 15 Cal.3d 806, 810–11.
Misdemeanor Joyriding ▸ Pen. Code, § 499b.

Petty theft is a not lesser-included offense of grand theft when the charge of grand theft is based on the type of property taken. (*People v. Thomas* (1974) 43 Cal.App.3d 862, 870.)

RELATED ISSUES

Asportation
To constitute a completed theft, the property must be asported or carried away. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654.) Asportation requires three things (1) the goods are severed from the possession or custody of the owner, (2) the goods are in the complete possession of the thief or thieves, and (3) the property is moved, however slightly. (*Ibid*.; *People v. Edwards* (1925) 72 Cal.App. 102, 114–15, disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740; *People v. Quiel* (1945) 68 Cal.App.2d 674, 679; *People v. Collins* (1959) 172 Cal.App.2d 295, 299 [joint possession of property by more than one thief].)

Claim of Right
If a person honestly believes that he or she has a right to the property even if that belief is mistaken or unreasonable, such belief is a defense to theft. (*People v. Romo* (1990) 220 Cal.App.3d 514, 518; see also, *People v. Devine* (1892) 95 Cal. 227, 229 ["[i]t is clear that a charge of larceny, which requires an intent to steal, could not be founded on a mere careless taking away of another's goods"]; *In re Bayles* (1920) 47 Cal.App. 517 [larceny conviction reversed where landlady actually believed she was entitled to take tenant's property for cleaning fees incurred even if her belief was unreasonable]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1; see instruction __, Claim of Right.)

Community Property
A person may be found guilty of theft of community property, but only if he or she has the intent to deprive the other owner of the property permanently. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1738–40.)

Fraudulent Refunds
A person who takes property while in a store and presents it for a refund is guilty of theft. (*People v. Davis* (1998) 19 Cal.4th 301.) The Supreme Court held that taking with the intent to fraudulently obtain a refund constitutes both an intent to permanently deprive the store of property and a trespassory taking within the meaning of larceny. (*Id.* at pp. 317–18; see also *People v. Shannon* (1998) 66 Cal.App.4th 649.)

Multiple or Single Conviction of Theft—Overall Plan or Scheme
If multiple items are stolen from a single victim over a period of time and the takings are part of one intent, plan, or impulse, only one theft occurs and the value of the items is aggregated when determining the degree of theft. (*People v. Bailey* (1961) 55 Cal.2d 514, 518–19; accord *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19–21; see instruction 1305, Theft: Degrees.)

Where multiple victims are involved, there is disagreement about applying the *Bailey* doctrine and cumulating the charges if a single plan or intent is demonstrated. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 30 [auctioneer stole proceeds from property belonging to several people during a single auction; conviction for multiple counts of theft was error]; and *People v. Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33 [series of petty thefts from numerous victims occurring over 10 month period properly consolidated into single grand theft conviction where defendant employed same scheme to defraud victims of money]; but see *People v. Garcia* (1990) 224 Cal.App.3d 297, 307–09 [defendant filed fraudulent bonds at different times involving different victims; multiple convictions proper].)

No Need to Use or Benefit From the Property Taken
It does not matter that the person taking the property does not intend to use the property or benefit from it; he or she is guilty of theft if there is intent to permanently deprive the other person of the property. (*People v. Kunkin* (1973) 9 Cal.3d 245, 251; *People v. Green* (1980) 27 Cal.3d 1, 57–58 [defendant intended to destroy the property]; *People v. Pierce* (1952) 110 Cal.App.2d 598, 609 [irrelevant that defendant did not personally benefit from embezzled funds].)

Possession
The victim of a theft does not have to be the owner of property, only in possession of it. (*People v. Edwards* (1925) 72 Cal.App. 102, 116.) “Considered as an element of larceny, “ownership” and “possession” may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner.” (*Ibid;* see also *People v. Davis* (1893) 97 Cal. 194, 195 [fact that property in possession of victim sufficient to show ownership].)

Unanimity of Theft Theory not Required
If multiple theories of theft have been presented, the jury does not need to agree on which form of theft was committed. All the jury must agree on is that an unlawful taking of property occurred. (*People v. Counts* (1995) 31 Cal.App.4th 785, 792–93; *People v. Failla* (1966) 64 Cal.2d 560, 567–69 [burglary case]; *People v. Nor Woods* (1951) 37 Cal.2d 584, 586 [addressing the issue for theft].)

Value
The property taken must have some intrinsic value, however slight. (*People v. Franco* (1970) 4 Cal.App.3d 535, 542.)

1305. Theft: Degrees

If you conclude the defendant committed a theft, you must decide whether the crime was grand theft or petty theft.

[Theft of (fruit/nuts/fish/_____) worth more than $100 is grand theft.]

[Theft of (a[n] automobile/firearm/horse/_____) is grand theft.]

[Theft of property from the body or of clothing worn by a person [or from a container being held or carried by a person] is grand theft, no matter how much the property is worth.]

[The defendant committed grand theft if (he/she) stole property [or services] worth more than $400. The defendant committed petty theft if (he/she) stole property [or services] worth $400 or less.]

[The value of (property/services) is the fair (market value of the property/market wage for the services performed).

Fair Market Value—Generally

[Fair market value is the highest price the property would reasonably have been sold for in the open market at the time and general location of the theft.]

Fair Market Value—Urgent Sale

[Fair market value is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.]

All other theft is petty theft.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if grand theft has been charged.

If the evidence raises an issue that the value of the property may be inflated or deflated because of some urgency on the part of either the buyer or seller, the second bracketed paragraph on fair market value should be given.

AUTHORITY

Determination of Degrees ▸ Pen. Code, §§ 486, 487–488.

COMMENTARY

The committee decided to include in the instruction, those definitions of grand theft that are most often charged. The statute contains other definitions of grand theft and should be referred to if the prosecutor is relying on another theory.

RELATED ISSUES

Taking From the Person
To constitute a taking from the person, the property must, in some way, be physically attached to the person. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1472.) Applying this rule, the court in *Williams* held that a purse taken from the passenger seat next to the driver was not a taking from the person. (*Ibid.* [see generally for court's discussion of origins of this rule].) In contrast, *Williams* was distinguished by the court in *People v. Higgins* (1997) 51 Cal.App.4th 1654, 1656–57, where evidence that the defendant took a purse placed on the floor next to and touching the victim's foot was held sufficient to establish a taking from the person. The victim intentionally placed her foot next to her purse, physically touching it and thereby maintaining dominion and control over it.

1308. Theft by False Pretense

The defendant is charged [in Count ___] with theft by false pretense. You may find the defendant guilty of this crime only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant knowingly and intentionally deceived a property owner [or the owner's agent] by false or fraudulent representation or pretense.

2. The defendant did so intending to persuade the owner [or the owner's agent] to let the defendant take possession of and title to the property.

3. The owner [or the owner's agent] let the defendant have the property because the owner [or the owner's agent] relied on the representation or pretense.

AND

4. When the defendant got the property, (he/she) intended to deprive the owner of it permanently.

You cannot find the defendant guilty of this crime unless one of the following is also true:

A. The false pretense was accompanied by either a writing or false token; or

B. There was a note or memorandum of the pretense signed or handwritten by the defendant; or

C. The pretense was proven by either testimony from two witnesses or testimony from a single witness along with other evidence supporting the conclusion that the defendant made the pretense.

A false pretense is any act, word, symbol, or token whose purpose is to deceive. [The pretense may be made directly or by implication. A person may make a false pretense by not disclosing information when there is an obligation to, or by giving information that is likely to mislead, if by doing either he or she intends to deceive.]

A false token is a document or object that is not authentic, but appears to be, and is used to deceive.

[An owner [or an owner's agent] relies on false pretence, if the falsehood is an important part of the reason the owner [or agent] decides to give up the property. The false pretense must be an important factor, but it does not have to be the only factor the owner [or agent] considered in making the decision.] [A false pretense is considered to be continuing so that an owner [or agent] who gives up property some time after the pretense was originally made still relies on the pretense.]

[A false pretense may be a false promise or a misrepresentation of fact. In either case, the defendant's intent to deceive must be proven by something more than just the false nature of the representation or the failure to perform the promise.]

[An agent is a person to whom the owner has given [complete or partial] authority and control over the owner's property.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of this crime, including the corroboration requirements stated in Penal Code section 532(b). (*People v. Mason* (1973) 34 Cal.App.3d 281, 286 [error not to instruct on corroboration requirements].)

If the property stolen is money, the court may want to substitute that word instead of property in the elements.

Related Instructions

If the defendant is charged with grand theft, also give instruction 1305 Theft: Degrees. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

AUTHORITY

Elements ▸ Pen. Code § 484; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842.
Corroboration Requirements ▸ Pen. Code § 532(b); *People v. Gentry* (1991) 234 Cal.App.3d 131, 139; *People v. Fujita* (1974) 43 Cal.App.3d 454, 470–71.
Reliance ▸ *People v. Wooten, supra,* 44 Cal.App.4th at pp. 1842–43 [defining reliance]; *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1413 [reversible error to fail to instruct on reliance]; *People v. Whight* (1995) 36 Cal.App.4th 1143, 1152.
Agent ▸ *People v. Britz* (1971) 17 Cal.App.3d 743, 752.

LESSER INCLUDED OFFENSES

Petty Theft ▸ Pen. Code, § 486.
Attempted Theft ▸ Pen. Code, §§ 663, 484.

RELATED ISSUES

See generally, the related issues section under instruction 1300, Theft by Larceny.

Attempted Theft by False Pretense
Reliance on the false pretense does not have to be proven for a person to be guilty of attempted theft by false pretense. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 467.)

Continuing Nature of False Pretense
Penal Code section 484 recognizes that theft by false pretense is crime of a continuing nature and covers any "property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question." (Pen. Code, § 484(a).)

Corroboration – Defined/Multiple Witnesses
"Corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way so as to reasonably satisfy the jury that the complaining witness is telling the truth." (*People v. Fujita* (1974) 43 Cal.App.3d 454, 470.) When considering if the pretense is corroborated the jury may consider "the entire conduct of the defendant, and his declarations to other persons." (*People v. Wymer* (1921) 53 Cal.App. 204, 206.) The test for corroboration of false pretense is the same as the test for corroborating the testimony of an accomplice in Penal Code section 1111. (*Ibid.*; see also *People v. MacEwing* (1955) 45 Cal.2d 218, 224.) To establish corroboration by multiple witnesses, the witnesses do not have to testify to the same false pretense. The requirement is satisfied as long as they testify to the same scheme or type of false pretense. (*People v. Gentry* (1991) 234 Cal.App.3d 131, 139; *People v. Ashley* (1954) 42 Cal.2d 246, 268.)

Distinguished from Theft by Trick
Although fraud is used to obtain the property in both theft by trick and theft by false pretense, in theft by false pretense, the thief obtains *both* possession and title to the property. For theft by trick, the thief gains only possession of the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258; *People v. Randono* (1973) 32 Cal.App.3d 164, 172.) False pretenses does not require that the title pass perfectly and the victim may even retain a security interest in the property transferred to the defendant. (*People v. Counts* (1995) 31 Cal.App.4th 785, 789–92.)

Fraudulent Checks
If a check is the basis for the theft by false pretense, it cannot also supply the written corroboration required by statute. (*People v. Mason* (1973) 34 Cal.App.3d 281, 288.)

Genuine Writings
A genuine writing that is falsely used is not a false token. (*People v. Beilfuss* (1943) 59 Cal.App.2d 83, 91 [valid check obtained by fraud not object of theft by false pretense].)

Implicit Misrepresentations
The misrepresentation does not have to be made in an express statement; it may be implied from behavior or other circumstances. (*People v. Mace* (1925) 71 Cal.App. 10, 21; *People v. Randono* (1973) 32 Cal.App.3d 164, 174–75 [analogizing to the law of implied contracts].)

Non-Performance of a Promise is Insufficient to Prove a False Pretense
The pretense may be made about a past or present fact or about a promise to do something in the future. (*People v. Ashley* (1954) 42 Cal.2d 246, 259–65.) If the pretense relates to future actions, evidence of non-performance of the promise is not enough to establish the falsity of a promise. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 469.) The intent to defraud at the time the promise is made must be demonstrated. As the court in *Ashley* stated, "[w]hether the pretense is a false promise or a misrepresentation of fact, the defendant's intent must be proved in both instances by something more than mere proof of non-performance or actual falsity." (*People v. Ashley, supra*, at p. 264 [court also stated that defendant is entitled to instruction on this point but did not characterize duty as sua sponte].)

1310. Theft by Trick

The defendant is charged [in Count ___] with theft by trick.

You may find the defendant guilty of theft by trick only if the prosecutor has proven beyond a reasonable doubt that:

1. The defendant obtained property that (he/she) knew was owned by someone else.

2. (He/She) obtained the property with the owner's [or the owner's agent's] consent, but got that consent by fraud or deceit.

3. When (he/she) obtained the property, (he/she) intended to deprive the owner of it permanently.

AND

4. (He/She) kept the property for any length of time.

[Getting the owner's [or the owner's agent's] consent to use the property for a specified purpose while intending to use it in a different way constitutes fraud or deceit.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the property stolen is money, the court may want to substitute that word instead of property in the elements.

Related Instructions
If the defendant is charged with grand theft, also give instruction 1305, Theft: Degrees. If the defendant is charged with petty theft, no other instruction is rquired, and the jury should receive a petty theft verdict form.

AUTHORITY

Elements of Theft ▸ Pen. Code, § 484.

LESSER INCLUDED OFFENSES

Petty Theft ▸ Pen. Code, § 486.
Attempted Theft ▸ Pen. Code, §§ 663, 484.

RELATED ISSUES

Distinguished From Theft by False Pretense
Although fraud is used to obtain the property in both theft by trick and theft by false pretense, in theft by false pretense, the thief obtains *both* possession and title to the property. For theft by trick, the thief gains only possession of the property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258; *People v. Randono* (1973) 32 Cal.App.3d 164, 172.)

1312. Theft by Embezzlement

The defendant is charged [in Count ___] with theft by embezzlement.

You may find the defendant guilty of theft by embezzlement only if the prosecutor has proven beyond a reasonable doubt that:

1. An owner [or the owner's agent] entrusted (his/her) property to the defendant to (use/manage/administer) for the owner's benefit.

2. The owner entrusted (his/her) property to the defendant because (he/she) had trust and confidence in the defendant to act reliably and honestly with respect to the property.

3. The defendant (converted/used) that property for (his/her) own benefit, and not the benefit of the original owner.

AND

4. At the time, the defendant intended to deprive the owner of the property for any period of time.

[An agent is a person to whom the owner has given [complete or partial] authority and control over the owner's property.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the property stolen is money, the court may want to substitute that word instead of property in the elements.

Related Instructions
If the defendant is charged with grand theft, give instruction 1305 Theft: Degrees. If the defendant is charged with petty theft, no other instruction is required, and the jury should receive a petty theft verdict form.

AUTHORITY

Elements ▸ Pen. Code, §§ 484, 503–515; *People v. Wooten* (1996) 44 Cal.App.4th 1835, 1845.

LESSER INCLUDED OFFENSES

Petty Theft ▸ Pen. Code, § 486.
Attempted Theft ▸ Pen. Code, §§ 663, 484.

RELATED ISSUES

Alter Ego Defense
A partner can be guilty of embezzling from his own partnership. "Though [the Penal Code] requires that the property be 'of another' for larceny, [it] does not require that the property be 'of another' for embezzlement. (Pen. Code, § 484.) "It is both illogical and unreasonable to hold that a partner cannot steal from his partners merely because he has an undivided interest in the partnership property. Fundamentally, stealing that portion of the partners' shares which does not belong to the thief is no different from stealing the property of any other person. (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 468.)

Fiduciary Relationships
Courts have held that creditor/debtor and employer/employee relationships are not presumed to be fiduciary relationships in the absence of other evidence of trust or confidence. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1846 [creditor/debtor]; *People v. Threestar* (1985) 167 Cal.App.3d 747, 759 [employer/employee].)

Series 1400 – Burglary

1400. Burglary

The defendant is charged [in Count __] with burglary.

You may find the defendant guilty of burglary only if the prosecutor has proven beyond a reasonable doubt that:

1. **The defendant entered a (building/locked vehicle/_____***[insert other statutory target]***).**

   AND

2. **When (he/she) entered the (building/locked vehicle/_____***[insert other statutory target]***), (he/she) intended to commit a (theft/rape**/_____*[insert other felony]***).**

Alternative A – Theft
[The defendant intended to commit theft if (he/she) intended to take property owned by someone else without the owner's consent, to deprive the owner of it permanently, and to keep the property for any length of time.]

Alternative B – Rape
[The defendant intended to commit rape if he intended to have sexual intercourse with a woman who was not his wife, without her consent and by force, duress, menace, or fear of immediate and unlawful bodily injury to her or to another person.]

[The defendant does not actually have to commit the intended (theft/ rape_____*[insert other felony]***).]**

[The prosecution alleges that the defendant intended to commit either _____ *[insert first felony]* **or _____** *[insert second felony]***. You may not find the defendant guilty of burglary unless you all agree that (he/she) intended to commit one of those crimes at the time of the entry. You need not all agree upon which one of those crimes (he/she) intended.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Although actual commission of the underlying theft or felony is not an element of burglary (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–42), the court has a **sua sponte** duty to instruct that the defendant must have intended to commit a felony. (*People v. Smith* (1978) 78 Cal.App.3d 698, 706.) In *People v. Failla* (1966) 64 Cal.2d 560, 564 the court imposed a sua sponte duty to define the elements of the underlying felony or theft when there was a factual issue whether the defendant's intended acts amounted to a felony or a misdemeanor. The committee recommends that the court define the elements of the underlying felony **sua sponte** in all cases.

This instruction includes the more common target felonies of theft and rape. If the prosecutor relies on a different felony, the court should tailor the elements of that felony using theft and rape as a model.

If the area alleged to have been entered is something other than a building or locked vehicle, insert the appropriate statutory target in the blank. Penal Code section 459 specifies the structures and places that may be the targets of burglary. The list includes a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, floating home as defined in Health and Safety Code section 18075.55 (d), railroad car, locked or sealed cargo container whether or not mounted on a vehicle, trailer coach as defined in Vehicle Code section 635, house car as defined in Vehicle Code section 362, inhabited camper as defined in Vehicle Code section 243, locked vehicle as defined by the Vehicle Code, aircraft as defined in Public Utilities Code section 21012, or mine or any underground portion thereof. (See Pen. Code, § 459.)

The jury does not have to unanimously agree upon the specific felony intended so long as they agree that the defendant entered with felonious intent. If the prosecutor is relying on more than one felony, the final bracketed paragraph explains this principle to the jury. (*People v. Failla* (1966) 634 Cal.2d 560, 568–69.)

Related Instructions

If the defendant is charged with first degree burglary, give instruction 1405, Burglary: Degrees. If the defendant is charged with second degree burglary, no other instruction is required and the jury should receive a second degree burglary verdict form.

AUTHORITY

Elements ▸ Pen. Code, § 459.
Instructional Requirements ▸ *People v. Failla* (1966) 634 Cal.2d 560, 564, 568–569; *People v. Smith* (1978) 78 Cal.App.3d 698, 706–711; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041–42.

LESSER INCLUDED OFFENSES

Attempted Burglary ▸ Pen. Code, §§ 663, 459.
Tampering With a Vehicle ▸ Veh. Code, § 10852; *People v. Mooney* (1983) 145 Cal.App.3d 502, 504–07 [if burglary of automobile charged].

RELATED ISSUES

Auto Burglary – Entry of Locked Vehicle
Under Penal Code section 459 forced entry of a locked vehicle constitutes burglary. Under existing case law, an entry within the meaning of section 459 includes entry into a locked vehicle with the requisite intent, whether it is entry through a door, window, or trunk. (*People v. Young K.* (1996) 49 Cal.App.4th 861, 863.) However, there must be, evidence of forced entry. (See *People v. Woods* (1980) 112 Cal.App.3d 226, 228–32 [if entry occurs through window deliberately left open, some evidence of forced entry must exist for burglary conviction]; *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220 [pushing open broken wing lock on window, reaching one's arm inside vehicle, and unlocking car door evidence of forced entry].)

Auto Burglary – Definition of Locked
To lock, for purposes of auto burglary, is "to make fast by interlinking or interlacing of parts … [such that] some force [is] required to break the seal to permit entry …" (*In re Lamont* (1988) 200 Cal.App.3d 244, 247, quoting *People v. Massie* (1966) 241 Cal.App.2d 812, 817 [vehicle was not locked where chains were wrapped around the doors and hooked together]; compare *People v. Malcolm* (1975) 47 Cal.App.3d 217, 220–223 [vehicle with locked doors but broken wing lock that prevented window from being locked, was for all intents and purposes a locked vehicle].)

Auto Burglary – Intent to Steal
Breaking into a locked car with the intent to steal the vehicle constitutes auto burglary. (*People v. Teamer* (1993) 20 Cal.App.4th 1454, 1457–58; see also *People v. Blalock* (1971) 20 Cal.App.3d 1078, 1082 [auto burglary includes entry into locked trunk of vehicle].) However, breaking into the headlamp housings of an automobile with the intent to steal the headlamps is not auto burglary. (*People v. Young K.* (1996) 49 Cal.App.4th

861, 864 [stealing headlamps, windshield wipers or hubcaps are thefts (or attempted thefts) or auto tampering or acts of vandalism, not burglaries].)

Building
A building has been defined for purposes of burglary as "any structure which has walls on all sides and is covered by a roof." (*In re Amber* (1995) 33 Cal.App.4th 185, 187.) Courts have construed "building" broadly and found the following structures sufficient for purposes of burglary: a telephone booth, a popcorn stand on wheels, a powder magazine dug out of a hillside, a wire chicken coop, and a loading dock constructed of chain link fence. (*People v. Brooks* (1982) 133 Cal.App.3d 200, 205 (citations omitted.) However, the definition of building is not without limits and courts have focused on "whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions." (*In re Amber* (1995) 33 Cal.App.4th 185, 187 [open pole barn is not a building]; and see *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423–24 [electric company's "gang box," a container large enough to hold people, is not a building. Court noted that this property is protected in other sections of the Penal Code].)

Burglarizing One's Own Home — Possessory Interest
A person cannot burglarize his own home as long as he has an unconditional possessory right of entry. (*People v. Gauze* (1975) 15 Cal.3d 709, 714.) However, a family member who has moved out of the family home, commits burglary if he makes an unauthorized entry with a felonious intent, since he has no claim of a right to enter that residence. (*In re Richard* (1988) 205 Cal.App.3d 7, 15–16 [defendant, who lived at youth rehabilitation center, properly convicted of burglary for entering his parent's home and taking property]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 889–93 [defendant convicted of burglarizing cabin owned and occupied by his estranged wife and her parents]; *People v. Sears* (1965) 62 Cal.2d 737, 746, overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478 [burglary conviction proper where husband had moved out of family home three weeks before and had no right to enter without permission]; compare *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704, 712–14 [husband had unconditional possessory interest in jointly owned home, his access to the house was not limited and strictly permissive, as was the case in *Sears*].)

Consent
While lack of consent is not an element of burglary, consent by the owner or occupant of property may constitute a defense to burglary. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–98; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [when an undercover officer invites a potential buyer of stolen property into his warehouse of stolen goods, in order to catch would-be buyers, no burglary occurred].) The consent must be express and clear; the owner/occupant must both expressly permit the person to enter and know of the felonious or larcenous intent of the invitee. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–98.) A joint property owner/occupant cannot

give consent to a third party to enter and commit a felony upon the other owner/occupant. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 421 [husband's consent did not preclude a burglary conviction based upon defendant's entry of premises with the intent to murder wife].)

Entry by Instrument
When an entry is made by an instrument, a burglary occurs if the instrument passes the boundary of the building and if the entry is the type that the burglary statute intended to prohibit. (*People v. Davis* (1998) 18 Cal.4th 712, 722 [placing forged check in chute of walk-up window of check-cashing facility was not entry for purposes of burglary] disapproving of *People v. Ravenscroft* (1988) 198 Cal.App.3d 639 [insertion of ATM card into machine was burglary].)

Temporal or physical proximity – Intent to Commit the Felony
According to some cases, a burglary occurs "if the intent at the time of entry is to commit the offense in the immediate vicinity of the place entered by defendant; if the entry is made as a means of facilitating the commission of the theft or felony; and if the two places are so closely connected that intent and consummation of the crime would constitute a single and practically continuous transaction." (*People v. Wright* (1962) 206 Cal.App.2d 184, 191 [defendant entered office with intent to steal tires from attached open air shed].) This test was followed in *People v. Nance* (1972) 25 Cal.App.3d 925, 931 [defendant entered a gas station to turn on outside pumps in order to steal gas]; *People v. Nunley* (1985) 168 Cal.App.3d 225, 230–32 [defendant entered lobby of apartment building, intending to burglarize one of the units]; and *People v. Ortega* (1992) 11 Cal.App.4th 691, 695–96 [defendant entered a home to facilitate the crime of extortion].)

However, in *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1246–48, the court applied a less restrictive test, focusing on just the facilitation factor. A burglary is committed if the defendant enters a building in order to facilitate commission of theft or a felony. The defendant need not intend to commit the target crime in the same building or on the same occasion as the entry. (*People v. Kwok, supra*, 63 Cal.App.4th at pp.1246–48 [defendant entered building to copy a key in order to facilitate later assault on victim].) The court commented that "the 'continuous transaction test' and the 'immediate vicinity test' are artifacts of the particular factual contexts of *Wright*, *Nance*, and *Nunley*." (*Id*. at p. 1247.) With regards to the *Ortega* case, the *Kwok* court noted that even though the *Ortega* court "purported to rely on the 'continuous transaction' factor of *Wright*, [the decision] rested principally on the 'facilitation' factor." (*Id*. at p. 1247–48.)

Multiple Convictions
Courts have adopted different tests for multi-entry burglary cases. In *In re William S.* (1989) 208 Cal.App.3d 313, 316–18, the court analogized burglary to sex crimes and adopted the following test formulated in *People v. Hammon* (1987) 191 Cal.App.3d 1084,

1099 [multiple penetration case]: "'[W]hen there is a pause . . . sufficient to give defendant a reasonable opportunity to reflect upon his conduct, and the [action by the defendant] is nevertheless renewed, a new and separate crime is committed.'" (*In re William S., supra,* 208 Cal.App.3d at p. 317.) The court in *William S.* adopted this test because it was concerned that under certain circumstances, allowing separate convictions for every entry could produce "absurd results." The court gave this example: where "a thief reaches into a window twice attempting, unsuccessfully, to steal the same potted geranium, he could potentially be convicted of two separate counts." (*Ibid*.) The *William S.* test has been called into serious doubt by *People v. Harrrison* (1989) 48 Cal.3d 321, 332–32, which disapproved of *Hammon*. *Harrison* held that for sex crimes each penetration equals a new offense. (*People v. Harrison, supra,* 48 Cal.3d at p. 329.)

The court in *People v. Washington* (1996) 50 Cal.App.4th 568, 574–79, a burglary case, agreed with *William S.* to the extent that burglary is analogous to crimes of sexual penetration. Following *Harrison,* the court held that each separate entry into a building or structure with the requisite intent is a burglary even if multiple entries are made into the same building or as part of the same plan. (See also 2 Witkin and Epstein, Cal. Criminal Law (2d. ed. 1999 Supp.) "Multiple Entries," § 662A, p. 38.) The court further stated that any "concerns about absurd results are better resolved under Penal Code section 654, which limits the punishment for separate offenses committed during a single transaction, than by [adopting a different] rule that, in effect, creates the new crime of continuous burglary." (*People v. Washington, supra,* 50 Cal.App.4th at p. 578.)

Room

Penal Code section 459 includes "room" as one of the areas that may be entered for purposes of burglary. (Pen. Code, § 459.) An area within a building or structure is considered a room if there is some designated boundary, such as a partition or counter, separating it from the rest of the building. It is not necessary for the walls or partition to touch the ceiling of the building. (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1257–58 [office area set off by counters was a room for purposes of burglary].) Each unit within a structure may constitute a separate "room" for which a defendant can be convicted on separate counts of burglary. (*People v. O'Keefe* (1990) 222 Cal.APp.3d 517, 521 [individual dormitory rooms]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [separate business offices in same building].)

Theft

Any one of the four theories of theft will satisfy the larcenous intent required for burglary. (*People v. Dingle* (1985) 174 Cal.App.3d 21, 29–30 [entry into building to use person's telephone fraudulently]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30–31.)

1405. Burglary: Degrees

Burglary is divided into two degrees. If you conclude the defendant committed a burglary, you must then decide the degree.

First degree burglary is the entry of an inhabited (house/vessel/floating home/ trailer coach/part of a building).

A (house/vessel/floating home/trailer coach/part of a building) is inhabited if someone lives there and (1) is present or (2) has left but intends to return.

[A (house/vessel/floating home/trailer coach/part of a building) is inhabited if someone had been living there but left only because a natural or other disaster caused him or her to leave.]

[A "vessel" includes ships of all kinds, steamboats, steamships, canal boats, barges, sailing vessels, and any structure intended to transport people or merchandise over water.]

[A "floating home" is a floating structure that:
(1) is intended to be used as a stationary waterborne residence;
(2) does not have its own mode of power;
(3) is dependent on a continuous utility link originating on shore;
AND
(4) has a permanent continuous hookup to a sewage system on shore.]

[A "trailer coach" is a vehicle without its own mode of power, designed to be drawn by a motor vehicle. It is made for human habitation or human occupancy and for carrying property.]

[A "trailer coach" is also a park trailer that is intended for human habitation for recreational or seasonal use and:
(1) has a floor area of no more than 400 square feet and does not exceed 12 feet in width or 40 feet in length in the traveling mode;
(2) is built on a single chassis;
AND
(3) may only be transported on public highways with a permit.]

All other burglaries are second degree.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction if first degree burglary has been charged.

AUTHORITY

Determination of Degrees ▸ Pen. Code, § 460.
Inhabitation Defined ▸ Pen. Code, § 459.
Vessel Defined ▸ Harb. & Nav. Code, § 21.
Floating Home Defined ▸ Health & Saf. Code, § 18075.55(d).
Trailer Coach Defined ▸ Veh. Code, § 635; Health & Saf. Code, § 18010(b).

RELATED ISSUES

Dwelling Houses for Purposes of First Degree Burglary
A "house" has been broadly defined as "any structure which has walls on all sides and is covered by a roof." (*People v. Wilson* (1992) 11 Cal.App.4th 1483, 1487–89, citing *People v. Buyle* (1937) 22 Cal.App.2d 143, 148.) The following structures have each been held to be a dwelling house or part of a dwelling house for purposes of first degree burglary: a hospital room to which a patient was assigned overnight (*People v. Fond* (1999) 71 Cal.App.4th 127, 131–32); an occupied hotel room (*People v. Fleetwood* (1985) 171 Cal.App.3d 982, 988); a tent (*Wilson, supra*, 11 Cal.App.4th at pp. 1487–89); a common-area laundry room located under the same roof as and contiguous to occupied apartments (*People v. Woods* (1998) 65 Cal.App.4th 345, 348–349); an attached garage (*People v. Fox* (1997) 58 Cal.App.4th 1041; *People v. Moreno* (1984) 158 Cal.App.3d 109, 112); a storeroom connected to a house by a breezeway (*People v. Coutu* (1985) 171 Cal.App.3d 192, 193); and an unoccupied but occasionally used guest house (*People v. Hines* (1989) 210 Cal.App.3d 945, disapproved of on other grounds in *People v. Allen* (1999) 89 Cal.Rptr.2d 279.)

Mistake Concerning Residential Nature of Building
A reasonable but mistaken belief that a dwelling house is not inhabited is not a defense to first degree burglary. (*People v. Parker* (1985) 175 Cal.App.3d 818, 822–24.) The Penal Code does not make knowledge that a "dwelling house" is "inhabited" an element of first degree burglary. (See Pen. Code, §§ 459, 460; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 843–48.)